

# The Antitrust Rationale for the Expansion of Professional Sports Leagues

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## I. ANTITRUST AS A REMEDY FOR SPORTS LEAGUES' REFUSAL TO EXPAND

Professional sports leagues are one of the last refuges of unchallenged monopoly power in America. Most monopolies have been forbidden by regulation or judicial decree from abusing their market power.<sup>1</sup> However, Major League Baseball, the National Football League ("NFL"), the National Basketball Association ("NBA"), and the National Hockey League ("NHL") have each been able to acquire, maintain, and exercise their monopoly power with little judicial or regulatory oversight. Although the courts have allowed antitrust challenges to certain aspects of league behavior (such as restrictions on the free movement of players or franchises),<sup>2</sup> they have not directly challenged the means by which the owners of professional sports teams achieve their monopoly profits. The owners have successfully conspired to keep the number of franchises substantially below that which would exist in a free market. They have enforced this conspiracy through super majority voting requirements in the leagues' bylaws which have prevented the leagues from expanding to meet the demand from cities capable of supporting professional sports franchises.<sup>3</sup> The resulting artificial scarcity of franchises has given owners the leverage to force fans and taxpayers to provide them with billions of dollars in subsidies.<sup>4</sup>

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<sup>1</sup> See, e.g., *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973) (requiring electric power company to sell electric power to municipalities); *Silver v. New York Stock Exch.*, 373 U.S. 341 (1963) (requiring New York Stock Exchange to provide full access by broker-dealer to facilities of the Exchange); *Associated Press v. United States*, 326 U.S. 1 (1945) (voiding Associated Press bylaw which allowed newspapers to veto the admission of their competitors). Numerous regulatory measures control the undue exercise of monopoly power. For example, the 1992 Cable Act prohibits cable companies from denying fair access to their facilities by competing delivery systems. 47 U.S.C. § 548(b) (1994). The 1996 Telecommunications Act passed by Congress in February 1996 requires local telephone companies to allow their rivals to interconnect with their phone systems. See Edmund L. Andrews, *Congress Votes to Reshape Communications Industry, Ending a 4-Year Struggle*, N.Y. TIMES, Feb. 2, 1996, at A1, D6.

<sup>2</sup> See *infra* note 220 and accompanying text.

<sup>3</sup> See *infra* notes 85-94 and accompanying text.

<sup>4</sup> For a description of such subsidies, see notes 102-21 and accompanying text. "As

Neither the courts nor Congress has yet developed an effective remedy against this abuse of monopoly power.

The owners' refusal to expand their leagues to meet the demand for additional franchises constitutes exactly the type of conduct that the antitrust laws were designed to prevent. Agreements among competitors to limit the output of a particular product have long been considered one of the most serious antitrust violations.<sup>5</sup> Such agreements harm consumer welfare by raising prices, reducing quality, and limiting the range of choices available to consumers. As the Supreme Court stated in *National Collegiate Athletic Association v. Board of Regents*:<sup>6</sup>

A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of antitrust law. Restrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit.<sup>7</sup>

It would be a clear violation of the antitrust laws for a group of competing steel producers to pool their steel-making capacity in a joint venture and agree to place a ceiling on the amount of steel produced by the venture.<sup>8</sup> The

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Senator Frank Lautenberg has observed: "There is an artificial scarcity of teams that results from joint decisions of league members and their anticompetitive behavior. Demand is not met by supply; it is met by ransom and higher price franchises." Stephen F. Ross, *Monopoly Sports Leagues*, 73 MINN. L. REV. 643, 661 (1989). In describing the pressures which teams have placed on their communities, Neil Austrian, the President of the NFL, recently commented, "There is a greed level that has overtaken the entire country." Robert J. Vickers, *Cities Need Team Effort*, CLEV. PLAIN DEALER, Dec. 17, 1995, at B1, B3.

<sup>5</sup> [A]greements among competitors that achieve less than the competitive marketwide output are a classic concern of the antitrust laws. For a single firm to produce less than the optimal amount is one thing; for a group of competitors dominating a market to agree with each other to produce less than the optimal amount is quite another.

Herbert Hovenkamp, *Exclusive Joint Ventures and Antitrust Policy*, 1995 COLUM. BUS. L. REV. 1, 61.

<sup>6</sup> 468 U.S. 85 (1984).

<sup>7</sup> *Id.* at 107-08.

<sup>8</sup> For a description of the antitrust standards for analyzing joint ventures, see Joseph F. Brodley, *Joint Ventures and Antitrust Policy*, 95 HARV. L. REV. 1523 (1982); Thomas A. Piraino, Jr., *Reconciling Competition and Cooperation: A New Antitrust Standard for Joint Ventures*, 35 WM. & MARY L. REV. 871 (1994) [hereinafter Piraino, *Reconciling Competition*]; Thomas A. Piraino, Jr., *Beyond Per Se, Rule of Reason or Merger Analysis: A New Antitrust Standard for Joint Ventures*, 76 MINN. L. REV. 1 (1991); Robert Pitofsky, *A*

economic effects of the owners' artificial limits on the number of sports franchises are no less serious. Nevertheless, certain courts and antitrust commentators argue that sports leagues should not be subject to the same antitrust standards as other joint ventures.<sup>9</sup> They point out that sports leagues differ from joint ventures in other industries because teams must cooperate with each other in order for their product to be available at all.<sup>10</sup> According to this view, professional sports teams compete only on the field; they do not compete in an economic sense.<sup>11</sup>

This Article explains the deficiencies in such a view of sports leagues. Professional sports teams do, in fact, compete on an economic basis, and the antitrust laws should not treat them any differently than firms in other industries. Under the antitrust standards which apply to all other types of joint ventures, the professional sports leagues should be required to expand to include all qualified applicants.

A reasonable expansion of the leagues is compelled under two legal principles developed in the earliest days of antitrust jurisprudence. The "essential facilities" doctrine, which was first set forth by the Supreme Court in 1912,<sup>12</sup> requires that joint ventures adopt open membership policies when they control resources essential for effective competition in the relevant market. Since no team can participate in a major professional sport other than through Major League Baseball, the NFL, the NBA, or the NHL, the leagues should be deemed to be essential facilities. As such, they should be precluded from enforcing the unreasonably exclusionary membership restrictions currently in effect.<sup>13</sup>

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*Framework for Antitrust Analysis of Joint Ventures*, 74 GEO. L.J. 1605 (1986).

<sup>9</sup> See *supra* note 8.

<sup>10</sup> See *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978); *San Francisco Seals, Ltd. v. National Hockey League*, 379 F. Supp. 966 (C.D. Cal. 1974); Myron C. Grauer, *Recognition of the National Football League as a Single Entity Under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model*, 82 MICH. L. REV. 1 (1983); Hovenkamp, *supra* note 5, at 108; Gary R. Roberts, *The Evolving Confusion of Professional Sports Antitrust, the Rule of Reason, and the Doctrine of Ancillary Restraints*, 61 S. CAL. L. REV. 943 (1988) [hereinafter Roberts, *Evolving Confusion*]; Gary R. Roberts, *Sports Leagues and the Sherman Act: The Use and Abuse of Section 1 to Regulate Restraints on Intraleague Rivalry*, 32 UCLA L. REV. 219 (1984) [hereinafter Roberts, *Sports Leagues*].

<sup>11</sup> See *Smith*, 593 F.2d at 1178-79; *San Francisco Seals*, 379 F. Supp. at 969-70; Roberts, *Sports Leagues*, *supra* note 10, at 234-35.

<sup>12</sup> See *United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912).

<sup>13</sup> Under the essential facilities doctrine, any joint venture which controls a critical resource may be required to adopt an open membership policy. In the current American economy, "network" joint ventures are particularly likely to control technology which firms must access in order to compete in the relevant market. Thus, credit card systems, real estate

First conceived in 1898<sup>14</sup> and recently rediscovered by the federal courts,<sup>15</sup> the "ancillary restraints" doctrine defines the types of membership rules which the leagues should be permitted to adopt. Under the ancillary restraints doctrine, the courts have upheld restrictions on competition which are required to promote the legitimate efficiency objectives of joint ventures.<sup>16</sup> Although the leagues' current membership rules are broader than necessary for such objectives, the leagues should be permitted to enforce more narrowly drawn rules, including objective eligibility standards, reasonable limits on the total number of teams, and nondiscriminatory requirements for the payment of franchise fees.<sup>17</sup>

Taken together, the essential facilities and ancillary restraints doctrines provide an effective means of analyzing the membership restrictions of sports leagues. An integration of the two approaches would protect the legitimate interests of both the leagues and the consumers who have been harmed by the artificial scarcity of sports franchises. An integrated approach would require the leagues to open their membership to qualified cities, while permitting the leagues to retain membership restrictions necessary for their effective operation. The supply of professional sports franchises would then become more in line with demand, and the monopoly subsidies currently being exacted by the leagues would end.

Part II of this Article describes the ways in which sports leagues are similar to other "essential facility" joint ventures. Part III explains how each of the major sports leagues has misused its membership restrictions to prevent expansion to qualified cities. Part IV proposes a legal framework for analyzing the membership restrictions of each of the sports leagues, and Part V analyzes the leagues' current membership rules under the proposed legal standard. Part VI describes the specific types of league membership rules that would be acceptable under the proposed standard. Part VII explains how the courts may effectively regulate the expansion of sports leagues under the proposed standard. Finally, Part VIII discusses potential legal obstacles to the compelled

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multiple listing services, and telecommunications and utility networks, as well as sports leagues, may be deemed essential facilities to which open access is appropriate. See Thomas A. Piraino, Jr., *The Antitrust Analysis of Network Joint Ventures*, 47 HASTINGS L.J. 1, 52-58 (1995).

<sup>14</sup> See *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd as modified by*, 175 U.S. 211 (1899).

<sup>15</sup> See *infra* notes 180-93 and accompanying text.

<sup>16</sup> For a discussion of the application of the ancillary restraints doctrine in the joint venture context, see Thomas A. Piraino, Jr., *Making Sense of the Rule of Reason: A New Standard for Section 1 of the Sherman Act*, 47 VAND. L. REV. 1753, 1780-81 (1994); Piraino, *Reconciling Competition*, *supra* note 8, at 924-32.

<sup>17</sup> See *infra* notes 161-78 and accompanying text.

expansion of the leagues, including baseball's antitrust exemption, various statutes, and relevant common law precedent.

## II. THE ECONOMIC CHARACTERISTICS OF SPORTS LEAGUES

The legal framework for analyzing the membership restrictions of sports leagues should be derived from an understanding of the leagues' unique economic characteristics. Major League Baseball, the NFL, the NBA, and the NHL are each joint ventures. Furthermore, the leagues constitute a particular type of joint venture to which the courts have applied a specially tailored approach. Each of the leagues is an "essential facility" to which firms must have access in order to compete in the relevant market. Under the essential facilities doctrine, the courts have precluded such joint ventures from adopting exclusionary membership rules.

### A. *Sports Leagues as Joint Ventures*

#### 1. *The Nature of Joint Ventures*

Joint ventures are a unique form of business organization which require their own antitrust approach. The uniqueness of joint ventures stems from the manner in which they blend competition and cooperation. The members of a joint venture cooperate in order to accomplish certain specific objectives. Yet their cooperation on joint venture matters does not preclude them from continuing to compete outside the bounds of the venture.

If the various forms of business organization were classified along a continuum, joint ventures would lie at a mid-point between cartels and mergers. Joint ventures are more integrated than cartels but less integrated than mergers. Joint ventures are further distinguished from cartels by their pro-competitive purpose. In a joint venture, partners integrate their resources for a specific purpose, such as the production or marketing of a new product. The efficiencies created by joint ventures are similar to those resulting from mergers. Through their collaboration, the partners in a joint venture often can produce a product which none of the partners could have produced on their own.<sup>18</sup> Yet joint ventures also differ from mergers. Unlike mergers, they do not involve a complete integration of the partners' operations. Each of the

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<sup>18</sup> See Joseph F. Brodley, *Analyzing Joint Ventures with Foreign Partners*, 53 ANTITRUST L.J. 73, 75 (1984) (characterizing a joint venture as "an integration between firms that involves a clear addition to productive capacity . . . the creation of a new product or entry into a new market").

members of a joint venture continues its separate existence and continues to compete with its partners outside the scope of the venture.<sup>19</sup>

## 2. Cooperation Within League Joint Ventures

Professional sports leagues possess all the relevant characteristics of joint ventures. The sports leagues are highly integrated organizations to which individual teams surrender a large amount of their autonomy in order to ensure the efficient management of the relevant sport. Indeed, professional sports could not exist without league rules on matters such as schedules, player eligibility, and the manner in which games should be played. One of the most important efficiencies of professional sports leagues is the maintenance of competitive balance among the various teams. The leagues have implemented rules for revenue sharing, team salary caps, and the drafting of players to insure that, over a period of time, each team has an opportunity to contend for the championship of a particular sport.<sup>20</sup> Without such rules, fan interest in games would diminish, and the entire league would be adversely affected.<sup>21</sup>

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<sup>19</sup> For example, in the mid-1980s, General Motors and Toyota entered into a joint venture for the manufacture of compact automobiles at a plant in Fremont, California. The joint venture has not prevented General Motors and Toyota from aggressively competing in the international automobile market. In fact, General Motors has used knowledge acquired from the joint venture to improve its manufacturing techniques, and Toyota has used such knowledge to aid it in making automobiles at a new plant in Kentucky. See Paul C. Judge, *Toyota Plant is Expected for Kentucky*, N.Y. TIMES, Nov. 27, 1990, at D4; Jeremy Main, *How to Steal the Best Ideas Around*, FORTUNE, Oct. 19, 1992, at 102, 106.

<sup>20</sup> As Wellington Mara, the owner of the New York Giants, has concluded:

We have a very fragile, delicate thing in this league that allows Green Bay to compete with the Giants and for Buffalo to compete with Chicago, for small cities to compete with the big ones. It is sharing, a concept that we are in this thing together, and bylaws govern our action . . . I believe that is one of the things we will constantly face in the future—what's best for the league and what's best for each team. My view has always been that the league comes first.

Thomas George, *Rams Given Green Light for St. Louis Move*, N.Y. TIMES, Apr. 13, 1995, at B11, B17.

<sup>21</sup> See Joseph P. Bauer, *Antitrust and Sports: Must Competition on the Field Displace Competition in the Marketplace?*, 60 TENN. L. REV. 263, 276 (1993). Some studies have indicated that league attendance increases when championship races are closely contested. See Ross, *supra* note 4, at 670. The All-America Conference, a league which competed with the NFL in the 1940s, failed in part because the domination of the league by the Cleveland Browns for several years decreased fan attendance, even in Cleveland itself. See Grauer, *supra* note 10, at 24.

Because of the need to maintain competitive balance, sports teams do not compete off the field in the same way as independent firms. As one court pointed out, “[n]o NFL team . . . is interested in driving another team out of business, whether in the counting-house or on the football field, for if the League fails, no one team can survive.”<sup>22</sup> Some courts and commentators have concluded that cooperation among the members of sports leagues is so pervasive that teams should not be regarded as economic competitors at all. Professor Gary Roberts has argued that individual teams have “no economic purpose or revenue generating potential independent of their participation in the league”;<sup>23</sup> since sports teams cannot compete independently of the leagues in which they are members, the leagues should be viewed as single entities whose members are incapable of conspiring in violation of section 1 of the Sherman Act.<sup>24</sup> Because section 1 requires a “contract, combination . . . or conspiracy, in restraint of trade” among two or more parties, the single entity approach would exempt all restraints among sports teams from antitrust liability.<sup>25</sup> Several courts have supported such an approach by concluding that the members of professional sports leagues should not be regarded as separate competitors under the antitrust laws.<sup>26</sup>

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<sup>22</sup> *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1179 (D.C. Cir. 1978); *see also* *North Am. Soccer League v. National Football League*, 670 F.2d 1249, 1253 (2d Cir. 1982) (“[T]he economic success of each franchise is dependent on the quality of sports competition throughout the league and the economic strength and stability of other league members.”); *United States v. National Football League*, 116 F. Supp. 319, 323 (E.D. Pa. 1953) (“If all the teams should compete as hard as they can in a business way, the stronger teams would be likely to drive the weaker ones into financial failure. If this should happen not only would the weaker teams fail, but eventually the whole league . . . would fail . . .”).

<sup>23</sup> Roberts, *Evolving Confusion*, *supra* note 10, at 969 n.96.

<sup>24</sup> *See* Roberts, *Sports Leagues*, *supra* note 10, at 234 (“The member clubs are not natural competitors . . . no one team can rival another league member in marketing a game or games.”); *see also* ROBERT H. BORK, *THE ANTITRUST PARADOX* 278 (1978) (“[T]he league is best viewed as being the firm.”); JOHN C. WEISTART & CYM H. LOWELL, *THE LAW OF SPORTS* § 5.11, at 701 (1979) (“[I]t is proper that the [league] ‘agreements’ in question are viewed as essentially internal marketing decisions.”).

<sup>25</sup> 15 U.S.C. § 1 (1994). The court in *Los Angeles Memorial Coliseum Comm’n v. National Football League*, 726 F.2d 1381, 1387–88 (9th Cir. 1984), recognized that adoption of the single entity defense would effectively immunize professional sports leagues from antitrust challenges under section 1.

<sup>26</sup> *See* *Seattle Totems Hockey Club v. National Hockey League*, 783 F.2d 1347, 1350 (9th Cir. 1986) (rejecting plaintiffs’ claim that they were illegally denied entry to NHL, on grounds that they were “not competing with the NHL; [but] they were seeking to join it.”); *Mid-South Grizzlies v. National Football League*, 720 F.2d 772, 787 (3d Cir. 1983) (“There is no record evidence that professional football teams . . . compete . . .”); *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1178–79 (D.C. Cir. 1978) (“[T]he NFL clubs which have

### 3. *Competition Within League Joint Ventures*

The courts and commentators favoring the single entity approach have failed to recognize that, in a joint venture, competition and cooperation are not mutually exclusive. Indeed, the defining characteristic of a joint venture is the partners' ability to cooperate on certain matters while continuing to compete on others.<sup>27</sup> In sports leagues, as in other joint ventures, competition and cooperation coexist. The members of professional sports leagues share certain interests in the well-being of their common endeavor, but that commonality does not override their drive toward individual success.<sup>28</sup> Each team views its own interests as paramount and attempts to increase its share of league profits. Like the owners of any other business, team owners are primarily interested in maximizing the return on their investment. Thus each owner competes to enhance the value of its own team within the market for the purchase and sale of sports franchises.<sup>29</sup> The professional sports leagues are structured in a manner which permits teams to compete with each other on an economic as

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'combined' to implement the draft are not *competitors* in any economic sense."); *San Francisco Seals, Ltd. v. National Hockey League*, 379 F. Supp. 966, 970 (C.D. Cal. 1974) ("[NHL member clubs] are not competitors in the economic sense in this relevant market. They are, in fact, all members of a single unit . . .").

<sup>27</sup> The members of such ventures remain independent competitors despite their affiliation with the venture. Indeed, the existence of competition among joint venture members is what distinguishes a network joint venture monopoly from a single firm monopolist. The members of a network joint venture are not simply stockholders or partners in the venture; they are competitors whose continued rivalry benefits consumers. As such, they should not be allowed to conspire among themselves to prevent potential competitors from entering the primary market.

Piraino, *supra* note 13, at 26.

<sup>28</sup> See *Los Angeles Mem'l Coliseum Comm'n*, 726 F.2d at 1389 ("Although the business interests of League members will often coincide with those of the NFL as an entity in itself, that commonality of interest exists in every cartel.").

<sup>29</sup> This market should be deemed a separate relevant market for antitrust purposes. The courts have recognized the existence of a specific market for the sale of sports franchises. See *Piazza v. Major League Baseball*, 831 F. Supp. 420, 430 (E.D. Pa. 1993) (characterizing "the relevant product market as the market for existing American League and National League baseball teams"); see also *North Am. Soccer League v. National Football League*, 670 F.2d 1249, 1259 (2d Cir. 1982) (striking down NFL rule precluding NFL owners from owning franchises in other sports, on grounds that rule foreclosed soccer league from access to "the market supply of sports capital and skill"); *Murray v. National Football League*, 1996 U.S. Dist. LEXIS 9108, at \*35 (E.D. Pa. June 26, 1996) ("We cannot conclude, as a matter of law, that a jury could not find that a market existed for the sale and purchase of NFL franchises.").



well as an athletic basis. The teams in each league are separately owned and managed. Each team "conducts its own accounting, keeps its own profits, makes its own financial and investment decisions, and generally succeeds or fails on its own."<sup>30</sup> Although teams share certain revenues (such as those from national television contracts), they do not share profits, losses, or capital expenditures, and profits vary widely from team to team. The teams have separate income streams from local revenue sources such as parking, concessions, advertising, and radio and television broadcasts.<sup>31</sup>

In any joint venture, there is a tension between the members' willingness to cooperate on matters essential for the venture's success and their natural inclination to promote their own welfare. In each of the professional sports leagues, the balance in recent years has begun to shift more toward the teams' individual interests. To an increasing extent, owners have tended to favor their own objectives over those of the leagues as a whole. Owners are now more interested in enhancing the value of their teams than in insuring the leagues' overall effectiveness. Many owners have even become willing to circumvent league rules when they perceive such rules to be contrary to their individual interests.

This increased emphasis on competition over cooperation has been caused, to a great extent, by the escalation in professional athletes' salaries during the last decade.<sup>32</sup> Professional sports teams have always competed with each other to attract the best coaches and managers, but with the advent of free agency, competition has grown to sign the most talented players. Spurred by such competition, many teams are now attempting to avoid league rules on salary caps, revenue sharing, and franchise relocation. The Major League Baseball

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<sup>30</sup> Chicago Prof. Sports Ltd. Partnership v. National Basketball Ass'n, 874 F. Supp. 844, 849 (N.D. Ill. 1995).

<sup>31</sup> See *North Am. Soccer League*, 670 F.2d at 1252 (pointing out that each team is a separate legal entity, with separate income streams, and that expenses and profits are not shared with other teams); *Murray*, 1996 U.S. Dist. LEXIS 9108, at \*32 ("It is uncontested that individual NFL franchises compete within certain geographic regions for players, coaches, television revenue, ticket sales, sales of team paraphernalia, stadium rights, and the sale of concession items."); Michael S. Jacobs, *Professional Sports Leagues, Antitrust, and the Single-Entity Theory: A Defense of the Status Quo*, 67 IND. L.J. 25, 31 (1991).

<sup>32</sup> Between 1982 and 1993, the average player's annual salary increased from \$128,000 to \$463,000 in the NHL, from \$96,000 to \$737,000 in the NFL, from \$241,000 to \$1.1 million in Major League Baseball, and from \$235,000 to \$1.4 million in the NBA. See Chuck Johnson, *Miller: Salary Cap Merely Ploy to Avoid Competing for Players*, USA TODAY, Oct. 20, 1994, at C9. The total annual salary costs in the four major sports rose from \$1.9 billion in 1991 to \$2.9 billion in 1993, an increase of 53%. See Richard Alm, *Sports Teams Play Money Game*, THE DALLAS MORNING NEWS, Sept. 3, 1995, at A1.

owners have been unable to reach any agreement at all on a salary cap,<sup>33</sup> and the caps in the NBA and NHL are now so lenient that they have little effect on competition for players.<sup>34</sup> The NFL has had the strictest salary cap of all the leagues, but NFL teams have been able to mitigate the effects of the cap by paying large up-front signing bonuses that can be prorated over the life of a player's contract.<sup>35</sup>

In the NFL, the Dallas Cowboys have been the most aggressive in asserting their individual interests over those of the league as a whole. The Cowboys, in fact, have openly defied the NFL's rules on revenue sharing and recently challenged the league's legal right to enforce such rules.<sup>36</sup> Instead of negotiating its sale of licensed products through the NFL, as required by the league's bylaws, the team has entered into independent marketing agreements with Nike, PepsiCo, and American Express.<sup>37</sup> These arrangements allowed the Cowboys to spend \$67.2 million for players in 1995, while other NFL teams spent as much as forty percent less.<sup>38</sup>

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<sup>33</sup> In 1994, the Major League Baseball owners indicated a willingness to implement revenue sharing, contingent upon the players' agreement to a salary cap. See Ross Newhan, *Salary Cap Is Sticking Point*, L.A. TIMES, Aug. 12, 1994, at C1, C6; Allan H. Selig, *Players Must Do Their Part*, THE WASH. POST, July 24, 1994, at D4. The salary cap proposal triggered the baseball strike of 1994-1995, which ended without any agreement on a cap. See Bill Madden & Jere Hester, *Baseball Is Back*, N.Y. DAILY NEWS, Apr. 3, 1995, at A3.

<sup>34</sup> The NBA's 1994 salary cap was \$15.9 million, but some teams had 1994 payrolls in excess of \$40 million. See Mark Asher, *NBA Might Lock Out Players After Final Playoff Series Ends*, THE WASH. POST, June 13, 1995, at E1, E7. The so-called "Larry Bird" exception to the NBA's salary cap allows teams to exceed the cap when they resign veteran players. See *id.* The NBA owners tried to remove the Larry Bird exception in their 1995 negotiations with the players' union, but they only succeeded in modifying the exception to apply to players in their third year with the same team. See Richard Justice, *Finally, NBA Reaches Its Own Labor Day*, THE WASH. POST, Sept. 5, 1995, at C1, C8. The NHL owners attempted to negotiate a salary cap with their players during the NHL strike of 1994-1995, but they were only able to reach agreement on a cap for rookie players. See Kevin Allen, *Agents Ducking Under Rookie Cap with Performance Bonus Clauses*, USA TODAY, July 18, 1995, at C6; Len Hochberg, *Last-Minute Deal Saves NHL Season*, THE WASH. POST, Jan. 12, 1995, at A1, A13.

<sup>35</sup> See Peter King, *Down . . . and Out*, SPORTS ILLUSTRATED, Nov. 13, 1995, at 28, 30; Adam Teicher, *NFL Teams Walk when Money Talks*, THE KANSAS CITY STAR, Nov. 12, 1995, at A1.

<sup>36</sup> After the NFL sued the Cowboys for violating the league's revenue sharing rules, the Cowboys filed a \$750 million suit alleging that the rules violate section 1. See *Commissioner Rips Jones*, CLEV. PLAIN DEALER, Jan. 29, 1996, at C10.

<sup>37</sup> See Dave Anderson, *How Jones Bought the Super Bowl*, N.Y. TIMES, Jan. 29, 1996, at C1.

<sup>38</sup> See Leonard Shapiro, *League's Forward Progress Is Producing Some Major Pileups*,

In order to fund players' salaries, owners are now trying to maximize their revenue from local sources, such as parking, advertising, concessions, and luxury suites. A strong local revenue stream can give an owner the upper hand in attracting the most talented players, because such income is not subject to revenue sharing under the leagues' bylaws.<sup>39</sup> Many owners have learned during the last few years that the best way to enhance such revenue streams is to convince a local government to construct a new stadium. Not only are the stadiums paid for by the taxpayers, but they are also usually offered to teams at substantially below-market rental rates.<sup>40</sup> Furthermore, the new stadiums include luxury seating, which provides enormous profits to owners.<sup>41</sup>

Teams are therefore now engaged in intense competition to obtain the most favorable stadium packages. The NFL has recently entered an era of "franchise free agency" in which teams have been relocating at an unprecedented rate to cities willing to subsidize the construction of new stadiums. The relocation route was opened in 1984, when the Ninth Circuit held in *Los Angeles Memorial Coliseum Commission v. National Football League ("Raiders")*<sup>42</sup> that the NFL violated section 1 by refusing to approve the move of the Oakland Raiders to Los Angeles. As a result of that decision, many NFL teams have begun to disregard league rules on relocation. In March 1995, the NFL voted against the Rams' proposed move from Los Angeles to St. Louis, but one month later the owners reversed their decision in response to the Rams' threat of an antitrust suit based on the *Raiders* case.<sup>43</sup> The Cleveland Browns and Houston Oilers announced their moves to Baltimore and Nashville, respectively, before seeking league approval, and the Seattle Seahawks negotiated a deal to move to the Rose Bowl in violation of a specific NFL resolution requiring a team to obtain prior permission before relocating to the Los Angeles area.<sup>44</sup>

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THE WASH. POST, Nov. 10, 1995, at C1, C4.

<sup>39</sup> See Teicher, *supra* note 35. The NFL teams, for example, share gate receipts, national television revenue, and revenues from the licensing of team names and logos, but they do not share revenues from such local sources. See Richard Sandomir, *Dollars and Dallas: League of Their Own?*, N.Y. TIMES, Sept. 24, 1995, § 3, at 1, 13.

<sup>40</sup> When the Rams moved from Anaheim to St. Louis, their annual stadium rent declined from \$1.8 million to \$250,000. See Richard Alm, *The NFL's Suite Life*, DALLAS MORNING NEWS, Sept. 11, 1995, at D1. The Browns will not be paying any rent at all at their new stadium in Baltimore. See Stephen Phillips, *City Reworked the Numbers as Clock Ticked Down*, CLEV. PLAIN DEALER, Nov. 12, 1995, at A13.

<sup>41</sup> See *infra* notes 107-09 and accompanying text.

<sup>42</sup> 726 F. 2d 1381 (9th Cir. 1984) [hereinafter *Raiders*].

<sup>43</sup> See Leonard Shapiro, *Rams Approved for St. Louis Move*, THE WASH. POST, Apr. 13, 1995, at D1.

<sup>44</sup> See Shapiro, *supra* note 38; Timothy W. Smith, *N.F.L. Shifts: Seahawks Eye Los*

Since NFL teams are now so portable, several teams may compete head-to-head for the relocation subsidies being offered by a particular city.<sup>45</sup> In November 1995, for example, the Cleveland Browns, Cincinnati Bengals, Tampa Bay Buccaneers, and Arizona Cardinals were all considering a relocation to Baltimore. Fearful of losing the financial package offered by Baltimore, Art Modell, the owner of the Browns, secretly negotiated a deal and announced the Browns' move to Baltimore even as Cleveland voters were going to the polls to approve a tax to fund the renovation of Cleveland Stadium.<sup>46</sup>

Thus, the single entity theory espoused by a few courts and commentators bears no relationship to the reality of the modern sports marketplace. Although they share certain common objectives, the teams in Major League Baseball, the NFL, the NBA, and the NHL compete with each other on an economic basis. Indeed, the recent escalation in players' salaries has intensified the owners' competition to enhance their individual revenue streams. Because sports teams are separate economic entities, they are capable of conspiring to restrain trade in violation of section 1 of the Sherman Act. The competitive restraints implemented by professional sports teams, therefore, should be analyzed under the antitrust laws in the same way as the restraints ancillary to any other joint ventures among competitors.<sup>47</sup>

#### 4. *Sports Leagues' Incentive for Anticompetitive Conduct*

As competitors, the members of sports leagues have an incentive to

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Angeles, N.Y. TIMES, Feb. 2, 1996, at B9, B12. Seattle's owner voted in favor of that resolution just one year before the team announced its intention to move to Los Angeles. See *id.*

<sup>45</sup> Such competition has not been as intense among Major League Baseball owners. Because of its antitrust exemption, Major League Baseball has been able to control franchise relocations. Indeed, it has been 24 years since a Major League Baseball team has relocated. See Mark Maske, *Keeping Teams in Place Is Matter of Antitrust*, THE WASH. POST, Nov. 16, 1995, at B7.

<sup>46</sup> Al Davis, the owner of the Oakland Raiders, believes that Mr. Modell used inside information acquired as a member of the NFL's Finance Committee to beat the other teams to Baltimore. Tony Grossi, *Raiders' Davis Says Move Fails NFL Guidelines*, CLEV. PLAIN DEALER, Jan. 18, 1996, at A14.

<sup>47</sup> Several courts have characterized sports leagues as joint ventures. See *Chicago Prof. Sports Ltd. Partnership v. National Basketball Ass'n*, 961 F.2d 667, 673 (7th Cir. 1992) ("[W]e treat the NBA as a joint venture."); *North Am. Soccer League v. National Football League*, 670 F.2d 1249, 1251 (2d Cir. 1992) ("NFL is an unincorporated joint venture"); *Mackey v. National Football League*, 543 F.2d 606, 619 (8th Cir. 1976) ("[T]he NFL assumes some of the characteristics of a joint venture.").

conspire to keep their profits as high as possible. That incentive is greater than ever in the current economic environment, where the owners' revenue must keep pace with the increases in players' salaries. In order to maintain their monopoly leverage, Major League Baseball, the NFL, the NHL, and the NBA have each refused to expand to accommodate qualified cities' demand for new franchises.<sup>48</sup> That refusal reveals the extent to which professional sports teams today are, in fact, economic competitors.

If the members of a sports league did not compete on an economic basis, they would be perfectly willing to expand the number of franchises to meet the demand from qualified owners in cities without teams. Such expansion would benefit the league as a whole by adding to fan interest, enhancing national television revenues, and increasing receipts from the licensing of league products. However, because the team owners are in competition with each other in the market for the sale of franchises, they have an incentive to limit the number of available teams. Like the members of any other cartel, the owners of professional sports franchises can charge a higher price for their product if they limit its output. With a scarcity of franchises, owners can be ensured that they maintain their monopoly leverage. As long as there are enough qualified cities without teams, the owners will be able to play cities off against one another in bidding wars to obtain increasingly generous subsidies.

### B. Sports Leagues as Essential Facilities

The courts have characterized as essential facilities any joint ventures which control a nonduplicable resource to which access is necessary in order to compete effectively in a relevant market.<sup>49</sup> Such joint ventures constitute

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<sup>48</sup> See *infra* notes 85–93 and accompanying text.

<sup>49</sup> One commentator has described the essential facilities doctrine as follows:

[I]f a group of competitors, acting in concert, operate a common facility and if due to natural advantage, custom, or restrictions of scale, it is not feasible for excluded competitors to duplicate the facility, the competitors who operate the facility must give access to the excluded competitors on reasonable, non-discriminatory terms.

LAWRENCE A. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* 131 (1977). For criticisms of the essential facilities doctrine, see Hovenkamp, *supra* note 5, at 110 (referring to doctrine as “a relic of the populism that infected antitrust in earlier eras” which “suggests that weak or inefficient firms have some right that competitors give them a helping hand”); see also PHILLIP AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* § 9736.1, at 645 (Supp. 1996) (“[T]he ‘essential facility’ is just an epithet describing the monopolist’s situation: he possesses something the plaintiff wants. It is not an independent tool of analysis but only a label—a label that beguiles some commentators and courts into pronouncing a duty to deal . . .”).

bottlenecks or gateways through which firms must pass in order to enter a market. Each of the professional sports leagues should be deemed to be an essential facility. The leagues constitute a monopoly within each professional sport. No team can compete in Major League Baseball, the NFL, the NBA, or the NHL without being admitted to one of the leagues, and today it is impossible for prospective owners to form an effective rival league.

### 1. *The Essential Facilities Doctrine*

If a joint venture does not constitute the only means of entry to a particular market, the venture should be able to adopt any membership rules it wishes without running afoul of the antitrust laws. In such a case, competition is not harmed as a result of third parties' exclusion from the venture. Indeed, the membership restrictions of garden-variety joint ventures may actually promote competition. As a result of their exclusion from the venture, third parties may be encouraged to go it alone or to associate with other firms to compete with the relevant joint venture. A different approach is appropriate, however, for joint ventures which control access to a resource that is essential to effective competition in the relevant market. In such cases, a joint venture's exclusionary membership rules may have a significant anticompetitive effect because they can completely exclude firms from the relevant market. Under the essential facilities doctrine, the courts have required that such ventures adopt objective membership rules that give all qualified parties an opportunity to participate in the venture on equal terms.

The essential facilities doctrine has a long history in the Supreme Court. The 1912 Supreme Court case which established the doctrine involved a joint venture whose unique competitive advantage was conferred by geography. In *United States v. Terminal Railroad Association*,<sup>50</sup> fourteen railroads owned the Terminal Railroad Association, which controlled two bridges and a car ferry that crossed the Mississippi River at St. Louis. No railroad could access St. Louis, then a major railroad hub, from the east without using the Association's facilities. The cost for competitors to acquire similar means of access was prohibitive. The Court required that the Association allow all other railroads to use the bridges and ferry "upon such just and reasonable terms as shall place such [railroads] upon a plane of equality in respect of benefits and burdens with the [current owners]."<sup>51</sup>

In *Associated Press v. United States*,<sup>52</sup> the Court reviewed the membership rules of the Associated Press ("AP"). The AP competed with United Press and

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<sup>50</sup> 224 U.S. 383 (1912).

<sup>51</sup> *Id.* at 411.

<sup>52</sup> 326 U.S. 1 (1945).

International News Service in providing wire service reports to newspapers. Although the AP did not have a monopoly over such news, the Court pointed out that membership in the AP (which at the time of the suit had 1200 member newspapers) gave “many newspapers a competitive advantage over their rivals.”<sup>53</sup> The Court voided a provision of the AP’s bylaws which allowed a member newspaper to veto the admission of another newspaper operating in the same city and field (meaning morning, evening, or Sunday). Once a newspaper exercised its veto rights, an applicant could only be admitted upon a majority vote of all the members, and the Court concluded that this provision unduly restricted competition in the newspaper market.<sup>54</sup>

*Silver v. New York Stock Exchange*<sup>55</sup> involved the disapproval by the New York Stock Exchange of a broker-dealer’s application for connection to a private wire system among stock exchange members. The wire permitted brokers to receive “instantaneously available” market information and to trade with other brokers in the market.<sup>56</sup> The Court concluded that “[t]he concerted action of the Exchange and its members here was, in simple terms, a group boycott depriving petitioners of a valuable business service which they needed in order to compete effectively as broker-dealers in the over-the-counter securities market.”<sup>57</sup> *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*<sup>58</sup> concerned the refusal of an industry wide standards-setting organization to provide its “seal of approval” to plaintiff’s gas burner. The burner was not approved despite its apparent safety and efficiency. Without the seal of approval, the plaintiff was effectively precluded from selling its product in the market. The Court characterized the association’s conduct as an illegal group boycott.<sup>59</sup>

Several lower federal courts have adopted the essential facilities doctrine.

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<sup>53</sup> *Id.* at 17.

<sup>54</sup> *See id.* at 12–14.

<sup>55</sup> 373 U.S. 341 (1963).

<sup>56</sup> *See id.* at 348.

<sup>57</sup> *Id.* at 347.

<sup>58</sup> 364 U.S. 656 (1961).

<sup>59</sup> *See id.* at 658–60. In cases brought under section 2 of the Sherman Act, the federal courts have imposed a duty to deal on monopolists which is similar to the courts’ essential facilities approach under section 1. *See Otter Trail Power Co. v. United States*, 410 U.S. 366 (1973) (holding that electrical power company’s refusal to wheel electricity over transmission lines was illegal because the lines are an essential facility); *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1520–21 (10th Cir. 1984) (finding that ski area violated section 2 by refusing to cooperate in issuance of multi-mountain ski ticket that constituted essential facility), *aff’d*, 472 U.S. 585 (1985); *United States v. Standard Oil Co.*, 362 F. Supp. 1331, 1341 (N.D. Cal. 1972) (requiring owner of airport fuel storage facilities to share facilities with its competitors), *aff’d*, 412 U.S. 924 (1973).

*United States v. Realty Multi-List, Inc.*<sup>60</sup> involved the membership rules of a real estate multiple listing service. Citing *Terminal Railroad Association, Silver*, and *Associated Press*, the Fifth Circuit concluded that, since access to the service was critical for real estate brokers, they could not be excluded without adequate justification.<sup>61</sup> In *MCI Communications Corp. v. AT&T*,<sup>62</sup> AT&T had denied MCI access to AT&T's local telephone circuits, which AT&T then controlled through its regional Bell companies. The Seventh Circuit relied on the essential facilities doctrine in requiring AT&T to provide MCI with an interconnection between MCI's long-distance lines and AT&T's local lines. The court pointed out that it would not be "economically feasible for MCI to duplicate Bell's local facilities."<sup>63</sup>

A few essential facilities cases have involved professional sports leagues. In *Hecht v. Pro-Football, Inc.*,<sup>64</sup> the District of Columbia Circuit found that RFK Stadium in Washington, D.C. was an essential facility. The court concluded that the prospective owner of a franchise in the American Football League (which at the time of the suit competed with the NFL) should have been allowed to share the use of the stadium with the Washington Redskins.<sup>65</sup> Similarly, in *Fishman v. Estate of Wirtz*,<sup>66</sup> the Seventh Circuit concluded that a bidder for the Chicago Bulls should have been offered a lease for the Chicago Stadium because the stadium could not "feasibly be duplicated."<sup>67</sup> In *Murray v. National Football League*, the court denied a motion to dismiss a complaint alleging that the NFL's arbitration policy concerning the sale and purchase of ownership interests in franchises constituted an essential facility.<sup>68</sup>

## 2. Applying the Essential Facilities Doctrine to Sports Leagues

For owners who wish to compete in the relevant sports franchise market, access to the professional sports leagues is just as critical as the access sought by the plaintiffs in the essential facilities cases. The sports leagues, no less than the AP, the NYSE, or AT&T, control all means of entry to the relevant market. They, therefore, should not be allowed to continue their arbitrary

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<sup>60</sup> 629 F.2d 1351 (5th Cir. 1980).

<sup>61</sup> See *id.* at 1371.

<sup>62</sup> 708 F.2d 1081 (7th Cir. 1983).

<sup>63</sup> *Id.* at 1133.

<sup>64</sup> 570 F.2d 982 (D.C. Cir. 1977).

<sup>65</sup> See *id.* at 988.

<sup>66</sup> 807 F.2d 520 (7th Cir. 1986).

<sup>67</sup> See *id.* at 539.

<sup>68</sup> See *Murray v. National Football League*, 1996 U.S. Dist. LEXIS 9108, at \*41 (E.D. Pa. June 26, 1996).



refusal to admit qualified applicants.

For antitrust purposes, each of the major professional sports constitutes a separate market, and Major League Baseball, the NFL, the NBA, and the NHL each hold monopoly power within one of those markets. Products are considered to be within the same relevant market if consumers would be reasonably likely to substitute one product for the other.<sup>69</sup> One of the most important tests of interchangeability between two products is the extent to which sales of one product are responsive to price changes in the other product (called the "cross-elasticity of demand").<sup>70</sup> The federal enforcement agencies assume two products to be in the same market if, in response to a "small but insignificant" price increase by a monopolist, buyers would switch their purchases from one product to the other.<sup>71</sup>

The courts have recognized that, from a consumer's perspective, the type of sport produced by a particular league is not reasonably interchangeable with other sports or with other forms of entertainment. In *NCAA*, the Supreme Court upheld the District Court's finding that college football broadcasts constituted a separate market because they were watched by a unique audience for which advertisers were willing to pay a premium price.<sup>72</sup> Similarly, in *Raiders*, the Ninth Circuit found that NFL football was the relevant market in which to analyze the effects of the move of the Raiders from Oakland to Los Angeles. The court pointed out that NFL football was a unique product with "limited substitutes from a consumer standpoint."<sup>73</sup> Other courts have also found that major league hockey<sup>74</sup> and NBA basketball<sup>75</sup> constitute separate relevant markets for antitrust purposes.

Major League Baseball, the NFL, the NBA, and the NHL should, therefore, each be viewed as a separate market. The fans of each sport do not view other forms of entertainment as reasonable substitutes.<sup>76</sup> Fans generally

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<sup>69</sup> See *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 393, 404 (1956).

<sup>70</sup> See *id.* at 400; see also James L. Seal, *Market Definition in Antitrust Litigation in the Sports and Entertainment Industries*, 61 ANTITRUST L.J. 737, 737-38 (1993).

<sup>71</sup> See 1992 Horizontal Merger Guidelines, 57 Fed. Reg. 41552, 41554 (1992).

<sup>72</sup> See *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 111-12 (1984).

<sup>73</sup> *Los Angeles Mem'l Coliseum Comm'n v. National Football League*, 726 F.2d 1381, 1393 (9th Cir. 1984).

<sup>74</sup> See *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462, 471-72 (E.D. Pa. 1972) (finding that major league hockey generated higher ticket prices, increased television revenue, and higher player salaries than minor league, semi-professional, or amateur hockey).

<sup>75</sup> See *Fishman v. Estate of Wirtz*, 807 F.2d 520 (7th Cir. 1986).

<sup>76</sup> "Indeed, does anyone really contend that a season ticketholder of the Los Angeles Raiders would accept a showing of *Heidi* as a reasonable substitute?" Daniel E. Lazaroff, *The*

have not switched their allegiance from one professional sport to another when their favorite sport has raised ticket prices, suffered a strike, or experienced other difficulties.<sup>77</sup> Nor are fans likely to consider minor leagues as comparable to the four major professional sports leagues. Consider, for example, the \$300 million which the people of Maryland were willing to pay in 1995 to replace the Baltimore Stallions, a Canadian Football League team, with the Cleveland Browns.<sup>78</sup>

Each of the professional sports leagues constitutes a joint venture which controls the only means of access to the relevant sports market. As members of such a joint venture, the owners of professional sports franchises collectively hold monopoly power within each sport.<sup>79</sup> Obviously, no team can enter the relevant market without being admitted to a league. Furthermore, it is impractical for prospective team owners to form a new league which could compete with Major League Baseball, the NFL, the NBA, or the NHL. The barriers to entry for new leagues are simply too high.

Player costs in each of the leagues have now escalated to the point where they consume the largest portion of a team's revenues.<sup>80</sup> A new league would have to obtain a national television contract in order to afford players who are comparable in talent to those in an established league. Without a television contract, for example, a new football league could never compete in the players' market with the NFL teams, each of which currently receives approximately \$40 million a year as its share of national television revenues.<sup>81</sup>

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*Antitrust Implications of Franchise Relocation Restrictions in Professional Sports*, 53 *FORDHAM L. REV.* 157, 209 (1984).

<sup>77</sup> Major League Baseball, for example, did not attract additional fans from professional football when the NFL experienced difficulties as a result of five franchise relocations which were completed or announced during ten months in 1994-1995. As one baseball official stated with regard to the upheaval in the NFL, "I don't think that affects people coming out to this game or any other sport." See Claire Smith, *Baseball Senses Spring Thaw*, N.Y. TIMES, Feb. 4, 1996, § 8, at 1, 6.

<sup>78</sup> See Jay Apperson, *Stallions Fans Get a Loud Last Hurrah*, THE BALTIMORE SUN, Nov. 20, 1995, at A1.

<sup>79</sup> See *Murray v. National Football League*, 1996 U.S. Dist. LEXIS 9108, at \*39-41 (E.D. Pa. June 26, 1996) (denying motion to dismiss complaint alleging that NFL owners conspired to maintain their monopoly power in market for sale and purchase of NFL franchises); *United States Football League v. National Football League*, 644 F. Supp. 1040, 1042 (S.D.N.Y. 1986), *aff'd*, 842 F.2d 1335 (2d Cir. 1988) (finding that NFL monopolized the market for major league professional football in the United States).

<sup>80</sup> See Ross, *supra* note 4, at 726.

<sup>81</sup> See Shapiro, *supra* note 38. In 1961, in the Sports Broadcasting Act, Congress granted professional baseball, football, basketball, and hockey an exemption from the antitrust laws which permitted teams in the leagues to pool their individual rights to telecasts and to sell those rights as a package. See 15 U.S.C. §§ 1291-95 (1994). The effect of this legislation has

In order to obtain a national television contract, a new league would have to field teams in most of the major metropolitan areas in the country.<sup>82</sup> However, many of those cities already have franchises in the relevant sport, and it would be difficult for a new league to generate sufficient fan support in the same location for another team (particularly given the likelihood that the new league initially would be viewed as inferior). In light of these substantial barriers to entry, it is not surprising that, since World War II, no professional sports league has survived for more than a few years in competition with an incumbent league.<sup>83</sup>

Sports leagues thus possess all the relevant characteristics of the types of joint ventures which have been deemed to be essential facilities. As monopolies, the leagues control the resources essential to effective competition in each professional sports market, and they cannot reasonably be duplicated. Therefore, under the precedent of the essential facilities cases, the leagues

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been to enhance the market power of the current sports leagues in bargaining with the broadcasting networks, thus further raising barriers to entry for new leagues. *See* Bauer, *supra* note 21, at 274. In 1993, the Fox Network paid the NFL \$1.58 billion for the right to televise NFL games for four years and in 1994 it paid the NHL \$155 million for five years of broadcast rights. *See* Alm, *supra* note 32. In 1995, the Fox, NBC, and ESPN networks entered into a five-year contract with Major League Baseball at a cost of \$1.7 billion. *See* Smith, *supra* note 77, at 6.

<sup>82</sup> Some commentators have estimated that a new league would require at least eight viable franchises in order to be an effective competitor with an existing league. *See* Dick Patrick, *Franchise Moves Might Be the Next Agent of Change*, USA TODAY, Oct. 21, 1994, at C10.

<sup>83</sup> The NHL held a monopoly from 1917 until 1971, when the World Hockey Association was formed. *See* Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, 351 F. Supp. 462, 465-66 (E.D. Pa. 1972). The World Hockey Association ceased operations in 1979. The NBA was the only major professional basketball league from 1949 to 1960, when the American Basketball League was formed. That league ceased operations after only one and a half seasons. *See* LIONEL S. SOBEL, PROFESSIONAL SPORTS AND THE LAW 331 (1977). In 1966, the American Basketball Association was formed to compete with the NBA, but it collapsed in 1976. *See* American Basketball Ass'n Players Ass'n v. National Basketball Ass'n, 72 F.R.D. 594 (S.D.N.Y. 1976); Robertson v. National Basketball Ass'n, 72 F.R.D. 64 (S.D.N.Y. 1976), *aff'd*, 556 F.2d 682 (2d Cir. 1977). The NFL faced its first competition in 1946 when the All-American Conference was organized. That league ceased operations in 1949. *See* SOBEL, *supra*, at 381. The American Football League was established in 1959, but by 1966 a merger with the NFL was proposed. *See id.* at 383-84. *See generally* American Football League v. National Football League, 205 F. Supp. 60 (D. Md. 1962), *aff'd*, 323 F.2d 124 (4th Cir. 1963). By 1967 the merger was completed, and the two leagues combined to form the NFL. The World Football League was formed in 1974, but it went bankrupt and ceased operations the next year. *See* Mid-South Grizzlies v. National Football League, 550 F. Supp. 558, 562 (E.D. Pa. 1982), *aff'd*, 720 F.2d 772 (3d Cir. 1983).

should not be permitted to refuse to admit qualified applicants.<sup>84</sup>

### III. THE SPORTS LEAGUES' MISUSE OF MEMBERSHIP RESTRICTIONS

#### A. *The Leagues' Refusal to Expand*

The owners of sports teams exercise their monopoly power through the rules promulgated by their respective leagues. League restrictions on player movement, television broadcasts, and franchise relocation have all been deemed to constitute illegal uses of the owners' collective market power.<sup>85</sup> Team owners also exercise their monopoly power through restrictions on league membership. The bylaws of the professional sports teams have been designed to make expansion difficult and restrict the output of professional sports franchises. Indeed, the bylaws of Major League Baseball, the NFL, the NBA, and the NHL do not provide any objective standards for membership at all. They simply require a vote of three-fourths of all of the owners for the admission of new teams.<sup>86</sup> These provisions allow the owners to exclude new entrants for arbitrary or anticompetitive reasons. As the Ninth Circuit pointed out in the *Raiders* case, an owner need only muster a small number of votes to block the league's admission of a potential competitor.<sup>87</sup>

The sports leagues have used their restrictive membership rules as a means of refusing to expand to meet the demand from cities that legitimately could support new sports franchises. During the last twenty-five years, Major League Baseball has added only six teams.<sup>88</sup> The NFL, NBA, and NHL have only

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<sup>84</sup> See Hovenkamp, *supra* note 5, at 12 (comparing NFL to essential facilities in *United States v. Terminal Railroad Association*, 224 U.S. 383 (1912), and *Associated Press v. United States*, 326 U.S. 1 (1945)).

<sup>85</sup> See *infra* notes 209–19 and accompanying text.

<sup>86</sup> See National Football League Const. and Bylaws, Art. III, § 3.1(b). Major League Baseball requires a three-fourths vote of the clubs in the league to which a new team is admitted, and a majority vote of the clubs in the other league. See Major League Agreement, Art. V, § 2(b)(3)(i). The NHL Constitution requires a three-fourths vote of all the current teams for the admission of a new team. See Letter from David Zimmerman, Vice President and Associate General Counsel, National Hockey League, to Jon J. Goldwood (Jan. 29, 1996) (on file with author). The NBA bylaws require that expansion be approved by three-fourths of the league's teams. See Letter from Daniel Schoor-Rube, Staff Attorney, National Basketball Association, to Jon J. Goldwood (Feb. 20, 1996) (on file with author).

<sup>87</sup> See *Los Angeles Mem'l Coliseum Comm'n v. National Football League*, 726 F.2d 1381, 1397 ("[A]n owner need muster only seven friendly votes to prevent three-quarters approval for the sole reason of preventing another team from entering its market . . .").

<sup>88</sup> Major League Baseball has expanded from twenty-four to thirty teams during the last twenty-five years. The League added the Seattle Mariners and Toronto Blue Jays in 1977, and

undergone major expansions when they have felt compelled to eliminate competition by absorbing teams from rival leagues.<sup>89</sup> The NFL, in fact, has expanded by only four teams in the twenty-six years since its merger with the AFL.<sup>90</sup> In its 1995 expansion to Jacksonville and Charlotte, the NFL bypassed Baltimore and St. Louis, both of which have proven they could support NFL teams and which were prepared to offer lucrative stadium deals for an expansion team. By ignoring St. Louis and Baltimore, the NFL insured that those cities would offer generous incentives to lure existing teams, thus increasing the leverage of all the NFL owners in their current communities.<sup>91</sup> None of the professional sports leagues is expected to expand again in the near future,<sup>92</sup> despite the fact that several more cities could support franchises in

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the Colorado Rockies and Florida Marlins in 1993. *See* Patrick, *supra* note 80. In March 1995, the owners agreed to add the Arizona Diamondbacks and Tampa Bay Devil Rays, to begin play in 1998. *See* Murray Chass, *Usury Lectures the Owners as They Add Two Teams*, N.Y. TIMES, Mar. 10, 1995, at B12.

<sup>89</sup> In 1979, the World Hockey Association, a rival league to the NHL, ceased operations, and its franchises in Hartford, Winnipeg, Edmonton, and Vancouver were admitted to the NHL. *See* SOBEL, *supra* note 83, at 393. In 1976, American Basketball Association teams in Indiana, San Antonio, Denver, and New York received NBA franchises, and the ABA disbanded as a rival to the NBA. *See* American Basketball Ass'n Players' Ass'n v. National Basketball Ass'n, 72 F.R.D. 594, 596 (S.D.N.Y. 1976), *aff'd*, 556 F.2d 682 (2d Cir. 1977). The All-America Conference, a rival league to the NFL in the 1940s, ceased its operations in 1949, when Cleveland, San Francisco, and Baltimore were given NFL franchises. In 1966, Congress granted a statutory exemption for the merger of the NFL and the American Football League. *See* Act of Nov. 8, 1966, Pub. L. No. 89-800, § 6(b)(1), 80 Stat. 1508, 1515 (codified as amended at 15 U.S.C. § 1291 (1994)). In 1970, the two leagues combined to form the NFL.

<sup>90</sup> The NFL has expanded from twenty-six to thirty teams during the last twenty-five years, adding Tampa Bay and Seattle in 1976 and Carolina and Jacksonville in 1995. *See* Patrick, *supra* note 82. The NBA has added eleven teams since 1970, and the NHL has added fifteen teams. *See id.* Although they have expanded to a greater extent than the NFL or Major League Baseball, the NBA and NHL have not yet met the demand for franchises from qualified cities. *See infra* note 187 and accompanying text.

<sup>91</sup> In that connection, it is interesting to note that Art Modell, the owner of the Cleveland Browns, who later announced a move of his team to Baltimore, was reportedly very vocal in his opposition to the NFL granting an expansion franchise to Baltimore. *See* Thomas George, *Modell Joins Newest Game in Football*, N.Y. TIMES, Nov. 7, 1995, at B9.

<sup>92</sup> Rod Fort, a Washington State University economics professor, recently concluded that near-term expansion of any of the major sports leagues is unlikely. *See* Patrick, *supra* note 82. In February 1996, the NFL agreed to grant Cleveland an expansion team by 1999, but only if the city constructed a new stadium and if the NFL was unable to move an existing team to Cleveland prior to 1999. *See* Stephen Koff, et. al, *City, NFL Strike a Deal*, CLEV. PLAIN DEALER, Feb. 9, 1996, at A1, A18.

each of the leagues.<sup>93</sup>

By keeping the supply of franchises artificially low, the owners have been able to assure themselves of significant profits irrespective of the quality of their product. The owners are guaranteed that, whenever a team is for sale, several potential buyers will drive up the price by competing for the rare opportunity to own a sports franchise. If an owner wishes to retain control of a team, he or she can use the threat of a move to another city to obtain various subsidies from local governments.<sup>94</sup> In the unusual cases in which the owners do approve expansion, they have been able to exact enormous fees from the new franchise owners. For example, Gene Autry paid a \$2.45 million expansion fee to the American League in 1960 for the California Angels.<sup>95</sup> In 1995, the owners of the Arizona Diamondbacks and the Tampa Bay Devil Rays, which will begin play in 1998, agreed to pay the League a \$155 million fee, representing a more than sixty-fold increase in thirty-five years.<sup>96</sup>

The antitrust laws have consistently been deemed to prohibit conduct such as the owners' refusal to allow a reasonable expansion of their leagues. An antitrust commentator has pointed out that "practices that reduce . . . output and thus raise . . . price diminish consumer welfare and are therefore unlawful."<sup>97</sup> The Supreme Court has made it clear that the antitrust laws preclude agreements among joint venture members to restrict the output of their venture. In *NCAA*, the Court characterized price and output restraints as classic examples of the types of restraints that the Sherman Act was intended to

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<sup>93</sup> For a discussion of the studies indicating the types of cities that could support expansion teams, see *infra* note 203 and accompanying text.

<sup>94</sup> "[T]he NFL appears to be holding down the number of franchises and provoking bidding wars between cities trying to lure existing teams, often with promises of expensive, taxpayer-funded stadiums." Shapiro, *supra* note 38. As Robert Baade, an economist specializing in sports leagues, commented with respect to the recent move of the Cleveland Browns to Baltimore: "They have limited the supply of franchises so the values are very high; [t]he Browns value jumps significantly with this move, and the message it sends to other cities inflates the value of the other teams." *Id.* Andrew Zimbalist, an economics professor at Smith College, has pointed out that, for owners, "[h]aving demand for franchises exceed supply is always in their interest, so they can blackmail the cities they're in." Patrick, *supra* note 82.

<sup>95</sup> See *Who's Who of Owners*, CLEV. PLAIN DEALER, Aug. 21, 1994, at D6.

<sup>96</sup> See Chass, *supra* note 88. Franchise fees in the other leagues have also escalated significantly. The owners of the Minnesota Vikings paid the NFL a \$1 million expansion fee in 1961, while the owners of the Carolina Panthers and Jacksonville Jaguars each paid \$140 million in 1995. See Patrick, *supra* note 82. The owners of the Chicago Bulls paid the NBA a \$1.25 million fee in 1966, while the owners of the Toronto Raptors and Vancouver Grizzlies each paid \$125 million in 1995. See *id.* In the NHL, the Oakland Seals paid a \$2 million expansion fee in 1967, and the Florida Panthers and Anaheim Mighty Ducks each paid a \$50 million fee in 1993. See *id.*

<sup>97</sup> Jacobs, *supra* note 31, at 49.

prohibit.<sup>98</sup> In *Broadcast Music, Inc. v. CBS*,<sup>99</sup> the Court found that practices “tend[ing] to restrict competition and [to] decrease output” were a threat to “the proper operation of our predominantly free-market economy.”<sup>100</sup>

### B. *Consequences of the Sports Leagues’ Refusal to Expand*

Consumers have been harmed significantly as a result of the scarcity of franchises maintained by the professional sports leagues. As in the case of any other monopoly, the prices have risen, while the quality of the relevant product has declined.

In an open market, the owners of sports teams would have an incentive to provide their customers with the best possible product at the lowest possible price. However, as long as they maintain a limited supply of franchises, owners will be less compelled to manage their teams efficiently. The owners need not fear market retribution if they fail to control their costs or to field a quality team. Owners know that, in a monopoly market, fans have no choice but to endure the type of team that is put on the field. Owners have little incentive to control escalating players’ salaries because they can pass such costs on to local fans and taxpayers who have no alternative in the relevant sports marketplace.<sup>101</sup>

Because the number of cities able to support teams greatly exceeds the number of available franchises, even the most mediocre teams can play cities off against one other.<sup>102</sup> Such teams can obtain a windfall by moving to a new

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<sup>98</sup> National Collegiate Athletic Ass’n v. Board of Regents, 468 U.S. 85, 107-08 (1984).

<sup>99</sup> 441 U.S. 1 (1978).

<sup>100</sup> *Id.* at 19-20.

<sup>101</sup> As with other abuses of monopoly power, fans are the primary victims of inefficient management. Loyal fans of local teams, having no marketplace alternative to which they can turn, have little choice but to endure whatever management chooses to do. The dilemma facing proud fans who must suffer or cease patronizing teams they love is precisely the dilemma that competition, as enforced through antitrust policy, is designed to avoid.

Ross, *supra* note 4, at 702.

<sup>102</sup> In the NFL, for example, four teams concluded or announced moves during 1995. The Rams moved from Los Angeles to St. Louis in a deal valued at \$320 million. See Teicher, *supra* note 35, at A1. The Raiders decided to move from Los Angeles after Oakland offered \$223 million in subsidies. See Peter Fimrite, *Why Raiders Are a Bargain for Oakland*, S.F. CHRON., Sept. 5, 1995, at A1, A6. The Browns agreed to move from Cleveland to Baltimore for \$290 million, see Gail Kerr & Jeff Legwold, *The Deal: No New Taxes*, THE TENNESSEAN, Oct. 6, 1995, at A1, and the Oilers announced a move from Houston to Nashville valued at \$320 million, see John Helyar, *A Long Bomb*, WALL ST. J., Nov. 21,

city or simply threatening to do so. The Cleveland Browns, Houston Oilers, and Los Angeles Rams, for example, had a combined record of 101 wins and 139 losses during the last five years,<sup>103</sup> but they were each able to receive hundreds of millions of dollars in benefits by agreeing to move to Baltimore, Nashville, and St. Louis.<sup>104</sup> When such rewards are available for the most poorly managed teams, it is inevitable that the overall quality of teams in a league will decline over time.

In addition to reducing quality, the artificial scarcity of teams has raised prices in the sports franchise markets. Prices have increased in several different ways, both directly and indirectly, as a result of the leagues' refusal to expand to accommodate the demand for new franchises. Local governments have been forced to provide the owners with subsidies for the construction of new stadiums, thus increasing the tax burden on their citizens. Fans have had to pay more for the privilege of attending games in new stadiums. The subsidies from fans and taxpayers have increased the value of sports franchises, forcing new owners to pay more to acquire teams.

In recent years, stadium economics have accelerated the owners' demands for subsidies from fans and taxpayers. Indeed, the potential revenues from new stadiums are now so great that any professional sports franchise without a new facility considers itself economically inferior to its competitors. Leigh Steinberg, a players' agent, has concluded that any team with a stadium that is more than five years old is a candidate to relocate to obtain a new facility.<sup>105</sup> Owners believe such stadiums are obsolete because they lack the amenity of luxury suites.<sup>106</sup> Revenue from suites is particularly attractive to an owner because, under the bylaws of each of the major sports leagues, it need not be shared with other teams.<sup>107</sup> The revenues accruing to owners from suites can be

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1995, at A1. In the NHL, the Winnipeg Jets have moved to Phoenix, the Nordiques left Quebec for Denver, and the Edmonton Oilers and Florida Panthers are threatening to relocate. See Richard Sandomir, *New Option: Take the Team and Run*, N.Y. TIMES, Jan. 14, 1996, at B19, B20.

<sup>103</sup> See NATIONAL FOOTBALL LEAGUE OFFICIAL 1995 RECORD AND FACT BOOK 269-71 (1995).

<sup>104</sup> See *supra* note 102.

<sup>105</sup> See Sandomir, *supra* note 102, at 19, 20.

<sup>106</sup> Michael Ziets, a sports industry consultant, has concluded that, "Without enough skyboxes, a stadium is considered practically obsolete." See Randall Lane, *Bread and Circuses*, FORBES, June 6, 1994, at 62. The Orlando Magic, for example, is requesting a new arena with luxury suites, despite the fact that the Orlando Arena is only five years old. See *id.*

<sup>107</sup> See Teicher, *supra* note 35. The NFL, for example, shares revenue from national television advertising and the licensing of team names and logos. Gate receipts are also shared, with 60% going to the home team and 40% to the away team. See Jacobs, *supra* note 31, at 31 n.27. Local stadium revenues from parking, concessions, advertising, and luxury



enormous. Luxury seating at sports stadiums currently generates \$400 million a year in revenues in the four major sports, representing 21% of the amount brought in by all ticket sales.<sup>108</sup> It is therefore not surprising that more than half of the ninety-nine professional sports teams in the United States have either just moved into a new stadium or have plans to build one.<sup>109</sup>

Instead of improving their public schools, health care, or housing, cities are constructing stadiums, ballparks, and arenas in order to attract or retain sports teams.<sup>110</sup> Cities have been willing to guarantee team owners a broad range of subsidies, including tax abatement, free utilities, tax-supported stadium financing, and outright cash grants, and these subsidies have increased significantly in recent years.<sup>111</sup> In 1971, local stadium subsidies totaled approximately \$8 million.<sup>112</sup> A recent study concluded that subsidies for professional sports teams currently drain \$500 million annually from state and local governments.<sup>113</sup> Since 1992, cities have spent more than \$1 billion to build or renovate stadiums, and they are expected to spend another \$6 billion in the next three years.<sup>114</sup>

The latest development in stadium financing permits owners to obtain subsidies directly from the fans. The "personal seat license" ("PSL") is an advance fee paid by fans for the right to purchase season tickets. Some owners have charged more than \$5000 for a single PSL.<sup>115</sup> PSLs are helping to fund

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seating, however, are not shared. See Teicher, *supra* note 35.

<sup>108</sup> See Valerie Lister, *Owners Fill Up on Rising Revenues from Luxury Suites*, USA TODAY, Oct. 21, 1994, at C10.

<sup>109</sup> See Lane, *supra* note 106.

<sup>110</sup> Some have questioned the return on such investment. As Lake Forest College economist Robert Baade has pointed out: "If you want to subsidize an industry, subsidize an industry that's generating jobs that are high skill and high wage and not seasonal in nature . . ." Lane, *supra* note 106, at 64. In January 1996, several Maryland legislators questioned the advisability of spending approximately \$200 million to build a new stadium for the Browns. One legislator stated, "This does not make sense. I'd rather be building schools and roads and bridges." Tom Stuckey, *Browns Stadium Faces Challenges in Maryland*, CLEV. PLAIN DEALER, Jan. 12, 1996, at A14.

<sup>111</sup> See Lane, *supra* note 106, at 62-63; Ross, *supra* note 4, at 649. Stadium construction costs have been borne by federal as well as local taxpayers. Many of the new stadiums are being financed with bonds whose interest is exempt from federal taxes. The Browns' new stadium in Baltimore, for example, will cost the federal Treasury \$36 million in revenues. See *Commissioner Rips Jones*, *supra* note 36.

<sup>112</sup> See Ross, *supra* note 4, at 649.

<sup>113</sup> See Lane, *supra* note 106, at 63-64.

<sup>114</sup> See Alm, *supra* note 32. Cincinnati alone plans to spend \$540 million to build separate stadiums for its football and baseball teams. See *id.*

<sup>115</sup> The Carolina Panthers recently charged up to \$5400 for their PSLs. See Fimrite, *supra* note 102, at A6.

new or renovated stadiums in Oakland, St. Louis, Charlotte, Nashville, and Baltimore, which expect to raise a collective \$450 million from their sale.<sup>116</sup> If the professional sports leagues had not so carefully controlled their output of franchises, it is doubtful that fans would be willing to pay such sums simply for the privilege of buying a season ticket in a new stadium.<sup>117</sup>

In a competitive market, new stadiums would be built in response to demand from fans for better facilities. However, in the monopoly market of professional sports leagues, the usual laws of supply and demand have been turned on their head. It is not the welfare of consumers, but that of the team owners, which prevails. The new stadiums are not being constructed because fans are demanding luxury seating, but because the owners want to enhance their profits. Fans in most cities are perfectly content with the stadiums which the owners are attempting to replace. Nevertheless, because of the scarcity of franchises, local fans feel compelled to subsidize new stadiums in order to prevent their teams from relocating. The mere threat of moving to another city is now so credible that cities are willing to meet owners' demands for new stadiums.<sup>118</sup> In this era of franchise free agency, cities must take such threats seriously. Even strong local support no longer guarantees that a team will remain in a particular city.<sup>119</sup> Thus the sports leagues' monopoly leverage has created a perverse situation in which the fans must satisfy the owners instead of

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<sup>116</sup> See *id.*; Sandomir, *supra* note 102.

<sup>117</sup> Bob Costas, an NBC sports commentator, describes the trend toward PSL sales as "unseemly at its best, extortion at its worst." *Id.* at 4.

<sup>118</sup> In 1988, the State of Illinois agreed to build a \$135 million stadium for the Chicago White Sox after they threatened to move to St. Petersburg. See Lane, *supra* note 106, at 62-63. The Minnesota legislature agreed to an \$80 million takeover of the arena for the NBA's Minnesota Timberwolves after they proposed a move from Minneapolis. See *id.* at 63. The City of Edmonton agreed to improve the terms of the lease for the NHL's Oilers after they threatened to move. See Tim Crothers, *The Shakedown*, SPORTS ILLUSTRATED, June 19, 1995, at 78, 80. The City of Philadelphia gave the Eagles a more favorable lease in order to avoid their move to Phoenix. See Ross, *supra* note 4, at 650-51. Senator Frank Lautenberg explained that the scarcity of football teams caused the City's action: "If there was a team already in Phoenix, could the owner have held a gun to Philadelphia's head and to the heads of its many fans on both sides of the Delaware? I think not." *Professional Sports Community Protection Act of 1985: Hearings on S. 259 and S. 287 Before the Senate Comm. on Commerce, Science and Transportation*, 99th Cong., 1st Sess. 6 (1985).

<sup>119</sup> The Cleveland Browns, for example, agreed to move to Baltimore in November 1995, despite the fact that they attracted an average of approximately 70,000 fans per game for decades, had the strongest local ratings for their telecasts of any NFL team in the country, and sold more NFL-licensed products than any team other than the Dallas Cowboys. See Dave Anderson, *Heroes and Villains, Big and Small*, N.Y. TIMES, Dec. 31, 1995, § 8, at 1; Teicher, *supra* note 35.

*vice versa*.<sup>120</sup>

The subsidies from fans and local governments for the construction of new stadiums have substantially increased the value of sports franchises. Indeed, the greatest determinant of franchise value is no longer the size of the market in which a team is located, but the stadium deal which it is able to negotiate.<sup>121</sup> The annual revenue streams to individual teams from new stadiums generally range from \$15 to \$25 million, and a few teams expect to achieve \$35 to \$40 million in annual revenues.<sup>122</sup> Such revenues can significantly inflate a team's market value. Art Modell bought the Cleveland Browns for \$4 million in 1961. With the Browns' new stadium in Baltimore, estimates of the team's worth are now close to \$200 million.<sup>123</sup> The Baltimore Orioles sold for \$70 million in 1989. In 1990 the State of Maryland built the Camden Yards stadium for the Orioles, and in 1994 the owners of the team sold it for \$173 million, representing an appreciation of 250% in four years.<sup>124</sup> Because of the new stadium, the Orioles franchise currently has a greater value than baseball teams

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<sup>120</sup> Jerry Jones, the owner of the Dallas Cowboys, has provided a frank description of the NFL owners' monopoly leverage: "We all regret the situation in Cleveland, the team moving from Cleveland. But that exercise could well have us a new stadium in Baltimore, and a new stadium in Cleveland that ultimately will have an NFL team in it." Bud Shaw, *Tagliabue Presides over NFL Thievery*, CLEV. PLAIN DEALER, Jan. 30, 1996, at D1. Indeed, as a result of the Browns' move to Baltimore, the NFL was successful in obtaining new stadiums in both cities. See Bud Shaw, *NFL Shifts Gears for Seattle Fans*, CLEV. PLAIN DEALER, Feb. 17, 1996, at D1.

<sup>121</sup> Stadium subsidies have created a new division among teams in professional sports. Paul Tagliabue, the Commissioner of the NFL, recently stated: "there is a gap . . . between the haves and the have nots, which is being accelerated . . ." Shapiro, *supra* note 38, at C4. Traditionally, the determining factor between the haves and the have-nots has been market size. However, teams with new stadiums now have the upper hand, even if they are located in small markets. Thus, the Los Angeles Rams and Los Angeles Raiders were willing to move, respectively, from the nation's second-largest market to St. Louis, the number twenty market, and Oakland, which splits the number five market with the San Francisco 49ers; the Cleveland Browns announced a move from the number thirteen market to Baltimore, the twenty-third largest market; and the Houston Oilers agreed to move from the eleventh largest market to the thirty-third largest in Nashville. See *id.* at C4; Helyar, *supra* note 102; see also Shapiro, *supra* note 38.

<sup>122</sup> See Ray Waddell, *New Venues for Sports to Cost over \$5 Billion*, AMUSEMENT BUS., Vol. 107, No. 31, July 31, 1995, at 3. The Dallas Cowboys receive \$37 million in annual stadium revenues, see Michael K. Ozanian, *Suite Deals*, FIN. WORLD, May 9, 1995, at 42, 50, and the Detroit Tigers expect to receive \$40 million annually from a planned new stadium, see Alm, *supra* note 32.

<sup>123</sup> Shapiro, *supra* note 38.

<sup>124</sup> Lane, *supra* note 106, at 63.

in larger markets, including the New York Mets and Boston Red Sox.<sup>125</sup>

The artificial scarcity of franchises maintained by the professional sports leagues has created a vicious cycle which is harmful to the interests of American consumers. Team owners have sufficient leverage to force fans and local governments to pay for new stadiums which substantially enhance a team's revenues. Such revenues increase a team's market value, forcing subsequent owners to pay more to acquire the team. With the increased debt load incurred to buy a team, a new owner has an even greater need for subsidies from fans and taxpayers. And so the cycle of increasing costs and subsidies continues.

This cycle would be broken if the leagues were compelled to grant franchises to qualified owners in cities that could support a professional sports team.<sup>126</sup> Increased competition from additional franchises would bring the discipline of the free market to sports leagues. Since all cities of sufficient size would be entitled to a franchise, owners could no longer play cities off against one another. Instead of trying to woo away an existing franchise, the have-not cities would be more likely to seek an expansion team, which would have local ownership and its own local identity. An owner therefore could not use the threat of relocation as a way to obtain excessive subsidies from a host city. Since owners could not escape their problems simply by moving to another city, they would have a greater incentive to control costs and manage their teams efficiently. The prices of franchises would fall to a more reasonable level as supply became more in line with demand, and the enormous subsidies currently being offered by cities to sports teams would abate.

#### IV. A LEGAL FRAMEWORK FOR ANALYZING THE MEMBERSHIP RESTRICTIONS OF SPORTS LEAGUES

The relevant antitrust issue for sports leagues, as for most other types of joint ventures, is not the legality of the venture itself but of any ancillary restraints on competition agreed to by its members.<sup>127</sup> Joint venture

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<sup>125</sup> See Ozanian, *supra* note 122, at 42. It has been estimated that the value of the Texas Rangers' franchise increased by \$54 million after the completion of a new ballpark in Arlington, Texas. See Alm, *supra* note 32.

<sup>126</sup> Instead of compelled expansion, one commentator has proposed that the economic problems resulting from the monopoly power of sports leagues would be better resolved by breaking up the current leagues into rival leagues. See Ross, *supra* note 4, at 646, 748-54.

<sup>127</sup> Although one commentator has argued that the major professional sports leagues should be broken up, *see id.*, the prevailing view is that sports leagues do not violate the antitrust laws simply because they possess monopoly power. As Robert Bork has stated, "When a league of professional lacrosse teams is formed, it would be pointless to declare

membership restrictions constitute a type of ancillary restraint. They are, in effect, a joint refusal by the members of the venture to deal with third parties.

By integrating the ancillary restraints and essential facility doctrines, the courts can fashion an effective legal framework for analyzing the membership rules of sports leagues. Such an approach would put an end to the artificial scarcity of professional sports franchises. The essential facilities doctrine requires that the leagues not be given a free hand in implementing membership rules. Because league membership is a *sine qua non* for participation in the major professional sports, the leagues should not be permitted arbitrarily to deny admission to qualified applicants. Rather, they should be required to demonstrate a valid efficiency justification for any of their restrictions on membership.

The courts should not, however, require sports leagues to forego all membership restrictions. As legitimate joint ventures, the leagues should be permitted to enforce reasonable membership rules which are ancillary to their efficiency objectives. The ancillary restraints doctrine, which was first set forth in the earliest days of antitrust analysis, provides an effective basis for determining which membership rules are justified by a league's efficiency objectives. Under an ancillary restraints approach, membership rules would be upheld if they were no broader than required to promote such objectives. However, membership rules would be precluded if they were more restrictive than necessary to preserve a league's efficiency.<sup>128</sup>

Traditionally, the federal courts have treated harshly any agreements among competitors not to deal with third parties, characterizing them as "per se" illegal group boycotts.<sup>129</sup> Under the per se rule, the courts have refused to

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their cooperation illegal on the ground that there are no other professional lacrosse teams." BORK, *supra* note 24, at 278. In order to commit an antitrust violation, the members of sports leagues must agree to use their monopoly power in some anticompetitive manner which is not justified by the legitimate efficiencies which the leagues are designed to achieve.

<sup>128</sup> As Judge Bork recognized in *Rothery*, to be ancillary, a restraint "must be related to the efficiency sought to be achieved." *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986); *see also* *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1375 (5th Cir. 1980) ("[T]he requirements of the rules themselves must be reasonably necessary to the accomplishment of the legitimate goals [of the joint venture] and narrowly tailored to that end.").

<sup>129</sup> The term "group boycott" has been used rather loosely in antitrust, and it can apply to any agreement by a group of competitors to cease doing business with suppliers, customers, or other competitors for some anticompetitive purpose. For examples of per se illegal group boycotts, *see* *United States v. General Motors Corp.*, 384 U.S. 127 (1966) (Chevrolet dealers convinced General Motors to pressure other retailers not to deal with discounters); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) (appliance dealer induced manufacturers and wholesalers to sell only at discriminatory prices to

consider any justifications offered by defendants for conduct considered to be inherently anticompetitive. Thus, horizontal price fixing and territorial allocations, as well as group boycotts, have been found to be illegal on their face without any consideration of the potential efficiencies associated with such conduct.<sup>130</sup> By contrast, the courts have applied a more permissive "rule of reason" standard to other types of section 1 conduct. Under the rule of reason, the courts have been willing to consider all the economic circumstances surrounding a restraint before condemning it, including a defendant's efficiency justifications.<sup>131</sup>

There is some precedent for viewing the membership rules of essential facilities as per se illegal group boycotts. In *Silver*<sup>132</sup> and *Radiant Burners*<sup>133</sup> the Supreme Court applied the per se rule to the joint venture membership restrictions at issue.<sup>134</sup> In *Northwest Wholesale Stationers' v. Pacific Stationery & Printing Co.*,<sup>135</sup> the Court implied in dicta that the membership rules of essential facilities should be per se illegal. The Court stated that a per se approach is appropriate when a joint venture possesses "market power or exclusive access to an element essential to effective competition."<sup>136</sup> In *Fishman v. Estate of Wirtz*,<sup>137</sup> the Seventh Circuit cited *Northwest Wholesale* as authority for the per se illegality of the refusal by the owner of the Chicago Stadium to lease the facility to the firm bidding to purchase the Chicago Bulls.<sup>138</sup>

Under a per se approach, sports leagues would not have any opportunity to prove their justifications for membership rules. Such an approach, however, is too harsh for restrictions implemented by joint ventures, such as sports leagues, which require certain competitive restraints in order to make their products

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competing dealers); *Fashion Originators' Guild v. FTC*, 312 U.S. 457 (1941) (group of fashion designers agreed not to deal with retailers who copied designs of group members).

<sup>130</sup> See, e.g., *Arizona v. Maricopa Co. Medical Society*, 457 U.S. 332, 347 (1982) ("We have not wavered in our enforcement of the *per se* rule against price fixing."); *United States v. Topco Assocs.*, 405 U.S. 596 (1972) (per se illegality of horizontal territorial allocation); see *supra* note 129 (per se illegality of group boycotts).

<sup>131</sup> See *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918) (listing several factors a court should consider before invoking antitrust sanctions); see also *Continental T.V., Inc. v. GTE Sylvania*, 433 U.S. 36, 49 n.15 (1977) (citing the statement of the rule of reason in *Chicago Board of Trade*).

<sup>132</sup> *Silver v. New York Stock Exch.*, 373 U.S. 341 (1962).

<sup>133</sup> *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1980).

<sup>134</sup> See *supra* notes 55-59 and accompanying text.

<sup>135</sup> 472 U.S. 284 (1984).

<sup>136</sup> *Id.* at 296.

<sup>137</sup> 807 F.2d 520 (7th Cir. 1986).

<sup>138</sup> See *id.* at 541.

available at all. The leagues should be given a chance to demonstrate the reasonableness of their membership limitations. The ancillary restraints doctrine provides a framework for a rule of reason evaluation of the leagues' arguments.

The ancillary restraints doctrine originated in the 1898 case, *United States v. Addyston Pipe & Steel Co.*<sup>139</sup> In that case, Judge (later Chief Justice and President) Taft concluded that a restraint of trade should be permissible when it was "ancillary to the main purpose of a [lawful] contract [and is] reasonably adopted and limited to the necessary protection of a party in the carrying out of such purpose."<sup>140</sup> Under Judge Taft's approach, restrictions necessary to promote the procompetitive purposes of an underlying joint venture would be allowed; however, "naked" restraints unrelated to such purposes would be void.<sup>141</sup>

Other courts were slow to adopt the *Addyston Pipe* approach. Indeed, for nearly eighty years the doctrine was disregarded by the federal judiciary. In the last fifteen years, however, the ancillary restraints doctrine has re-emerged, as the federal courts have adopted a more sophisticated economic approach to antitrust analysis.<sup>142</sup>

Although the Supreme Court has not yet explicitly adopted the ancillary restraints doctrine, certain of its recent decisions appear to follow such an approach implicitly. In *BMI v. CBS*,<sup>143</sup> the Court considered the legality of a price-fixing arrangement among joint venture partners. BMI was an association of 20,000 musical composers. The composers granted to BMI the right to give a blanket copyright license, for a fixed fee, to those who wanted to play their music.<sup>144</sup> Conceding that the arrangement constituted price-fixing "in the literal

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<sup>139</sup> 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

<sup>140</sup> *Id.* at 283.

<sup>141</sup> See Roberts, *supra* note 10, at 1005; Bork, *supra* note 24, at 27 ("To be ancillary, and hence lawful, an agreement eliminating competition must be subordinate and collateral to a separate, legitimate transaction. The ancillary restraint is subordinate and collateral in the sense that it makes the main transaction more effective in accomplishing legitimate purposes.").

<sup>142</sup> See, e.g., *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85 (1984); *Broadcast Music v. CBS*, 441 U.S. 1 (1979). The re-emergence of the ancillary restraints doctrine has coincided with the courts' increased preference for a rule of reason over a per se approach. The rule of reason has now become the dominant approach to section 1 conduct, because it allows courts to consider all of the relevant economic effects of such conduct. See Piraino, *supra* note 16, at 1757-60; Thomas A. Piraino, Jr., *Reconciling the Per Se and Rule of Reason Approaches to Antitrust Analysis*, 64 S. CAL. L. REV. 685, 693-700 (1991).

<sup>143</sup> 441 U.S. 1 (1979).

<sup>144</sup> See *id.* at 5.

sense,"<sup>145</sup> the Supreme Court nevertheless held that the blanket license should be analyzed under the rule of reason because of its procompetitive aspects. The Court relied on the fact that the blanket license was, in effect, a new product<sup>146</sup> and that its price-fixing aspects were integral to the effective marketing of the product.<sup>147</sup>

Like the association of musical composers in *BMI*, sports leagues produce a product that could not exist in the absence of cooperation among joint venture partners. Thus, the Supreme Court has recognized that leagues should have the opportunity to demonstrate that certain restrictions on competition are necessary for their effectiveness. In *NCAA*, the Supreme Court considered the legality of the NCAA's limitations on the number of times each of its member schools could appear on television.<sup>148</sup> The Court acknowledged that these limitations constituted restrictions on output that "are ordinarily condemned" as per se illegal.<sup>149</sup> However, the Court found that certain restraints on competition are required for the very existence of intercollegiate football.<sup>150</sup> Therefore the Court used the rule of reason rather than a per se approach to analyze the broadcast restrictions.<sup>151</sup>

Many of the lower federal courts have concluded that these recent Supreme Court cases require that the ancillary restraints doctrine be applied to all joint ventures.<sup>152</sup> In *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*,<sup>153</sup> Judge

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<sup>145</sup> See *id.* at 8.

<sup>146</sup> "The blanket license is composed of the individual compositions plus the aggregating service. Here, the whole is truly greater than the sum of its parts; it is, to some extent, a different product." *Id.* at 21.

<sup>147</sup> "[T]he agreement on price is necessary to market the product at all." *Id.* at 23.

<sup>148</sup> 468 U.S. 85 (1984).

<sup>149</sup> See *id.* at 100.

<sup>150</sup> See *id.* at 100-01.

<sup>151</sup> See *id.* at 104-20. The lower federal courts have also generally used the rule of reason to analyze the competitive restraints of sports leagues. See, e.g., *North Am. Soccer League v. National Football League*, 670 F.2d 1249 (2d Cir. 1982) (applying rule of reason to ban on cross-ownership of sports franchises); *Smith v. Pro-Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1979) (using rule of reason to analyze NFL draft).

<sup>152</sup> See *SCFC ILC, Inc. v. VISA USA, Inc.*, 36 F.3d 958, 970 (10th Cir. 1994) (permitting membership restrictions of Visa credit card system on grounds they were "reasonably related to Visa USA's operation and no broader than necessary to effectuate the association's business"); *National Bancard Corp. v. VISA USA, Inc.*, 779 F.2d 592, 605 (11th Cir. 1986) (upholding "interchange fee" among banks in credit card system on grounds fee helped insure universal acceptance of card); *Polk Bros., Inc. v. Forest City Enters., Inc.*, 776 F.2d 185 (7th Cir. 1985) (applying rule of reason to noncompetition agreement between neighboring stores because agreement was necessary for effectiveness of their cooperative marketing program); see also *Los Angeles Mem'l Coliseum Comm'n v. National Football League*, 726 F.2d 1381, 1397 (9th Cir. 1984) (finding, in dicta, that NFL restrictions on team



Bork found that the Supreme Court had implicitly adopted the ancillary restraints doctrine in its recent cases. He even concluded that the Court's decisions constituted a "statement of the law of ancillary restraints . . . so close to that of *Addyston Pipe & Steel* as to be virtually indistinguishable."<sup>154</sup>

The recent revival of the ancillary restraints doctrine in the federal courts leaves little doubt that the approach should be used to analyze the membership rules of sports leagues. Under an ancillary restraints approach, the courts would consider the relationship between the leagues' membership restrictions and their efficiency objectives. The leagues would be permitted to adopt membership rules that were reasonably tailored to achieve such legitimate objectives as competitive balance, fan interest, and scheduling efficiency. However, the leagues would not be allowed to enforce restrictions on membership if they could accomplish the same objectives through less restrictive means.<sup>155</sup>

## V. AN ANALYSIS OF THE CURRENT MEMBERSHIP RULES OF SPORTS LEAGUES

### A. *Allocating the Burden of Proof*

The courts are justified in placing the burden on sports leagues to prove that their membership restrictions should be upheld as ancillary restraints. Such a shifting of the burden of proof is fair because the leagues themselves are in the best position to demonstrate which membership rules are necessary to insure their efficiency. Furthermore, unreasonable restrictions on membership by essential facilities such as sports leagues have serious anticompetitive effects. Since limitations on league expansion reduce the quality of team management and raise the prices paid by consumers,<sup>156</sup> the leagues should have the burden

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movement could withstand antitrust scrutiny if they were "closely tailored to serve the needs inherent in producing the NFL product . . .").

<sup>153</sup> 792 F.2d 210 (D.C. Cir. 1986).

<sup>154</sup> *Id.* at 229.

<sup>155</sup> Some lower federal courts have held that restraints implemented by sports leagues should not be permitted when the same objectives could be accomplished by less restrictive means. *See, e.g., Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462, 504 (E.D. Pa. 1972) (pointing out that courts should require evidence that legitimate objectives of restraints on movement of players could not be "obtained by devices with less anti-competitive potential") (citing Note, *The Super Bowl and the Sherman Act: Professional Sports and the Antitrust Laws*, 81 HARV. L. REV. 418, 422 (1967) [hereinafter *Super Bowl*]).

<sup>156</sup> For a description of the adverse consequences of the sports leagues' misuse of their monopoly power, see *supra* notes 101-26 and accompanying text.

of justifying such limitations.

Placing such a burden on the leagues is consistent with recent cases in which the Supreme Court has required defendants to affirmatively prove their justification for facially anticompetitive conduct. In *NCAA*, the Court emphasized that the NCAA's restrictions on television broadcasts raised prices and restricted output and concluded that "these hallmarks of anticompetitive behavior place upon . . . [the NCAA] a heavy burden of establishing an affirmative defense which competitively justifies this apparent deviation from the operations of a free market."<sup>157</sup> In *FTC v. Indiana Federation of Dentists*,<sup>158</sup> a group of dentists conspired to withhold x-rays from insurance companies evaluating benefit claims. The Court pointed out that the dentists had refused to provide consumers with a product they desired. Such conduct could not be sustained under the rule of reason absent the defendants' proof of "some countervailing procompetitive virtue."<sup>159</sup> These cases require that, in order to sustain their restrictions on membership, the professional sports leagues demonstrate that their conduct promoted a legitimate league objective.<sup>160</sup>

### B. *The Overbreadth of the Leagues' Current Rules*

Major League Baseball, the NFL, the NBA, and the NHL cannot meet the burden of proving the reasonableness of their current membership rules. The rules are too broad to withstand antitrust scrutiny. Each league requires a vote of three-fourths of the current owners to approve expansion.<sup>161</sup> To preserve their efficiency, it is not necessary for the leagues to enforce such a broad prohibition on the admission of new teams. Less restrictive alternatives are available.

In several cases, the courts have precluded the enforcement of membership rules which were no less broad than those of the major professional sports leagues. In *Associated Press*, the Supreme Court voided an AP bylaw that required a majority vote of the AP members for the admission of a newspaper

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<sup>157</sup> *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 113 (1984).

<sup>158</sup> 476 U.S. 447 (1986).

<sup>159</sup> *Id.* at 459.

<sup>160</sup> The federal antitrust enforcement agencies have also recognized the burden that network joint ventures must meet in order to sustain membership restrictions. See *Anticipating the 21st Century: Competition Policy in the New High-Tech, Global Marketplace*, A Report by the Federal Trade Commission Staff (May, 1996), 70 BNA Anti. & Trade Reg. Rep., No. 1765 (June 6, 1996), at S-92 ("We believe that when demand-side scale economics render effective intersystem competition outside a network joint venture less viable, heightened scrutiny of membership denials is warranted.").

<sup>161</sup> See *supra* note 86 and accompanying text.

that competed with a current member.<sup>162</sup> Similarly, in *Realty Multi-List*, the Fifth Circuit prohibited a real estate multiple listing service from enforcing subjective membership requirements, including rules that brokers have a "favorable credit report and business reputation."<sup>163</sup> Finally, in *Blalock v. LPGA*,<sup>164</sup> the court overturned a golf association's "unfettered, subjective discretion" to suspend a player for one year without any legitimate reason.<sup>165</sup>

There is no legitimate objective of the professional sports leagues that could not be accomplished by less restrictive membership rules than those currently in existence. None of the efficiencies for which the leagues are designed—preserving competitive balance, maintaining an efficient capacity, or protecting the investment of individual team owners—requires that expansion be limited to those owners who can muster a three-fourths majority in favor of their admission.

### 1. *The Competitive Balance Argument*

The maintenance of competitive balance is one of the most important objectives of professional sports leagues. In order to retain fan interest, the leagues must insure that, over a period of time, each team has a reasonable opportunity to contend for the championship of a particular sport. Competitive balance requires that each team be competently managed and have a comparable ability to obtain the most talented players. Revenue sharing, salary caps, the draft of amateur players, and restrictions on player mobility are examples of restraints that have been designed by leagues to help ensure competitive balance.

The current membership restrictions of the professional sports leagues are not justified by the need for competitive balance. One of the principal arguments against the expansion of sports leagues is the potential lack of "sufficient player talent to produce a proper caliber of play in expanded leagues."<sup>166</sup> However, player talent can be distributed over a larger number of teams just as evenly as it is distributed over the current teams in each of the leagues. Furthermore, fan enjoyment is more a function of the relative parity among teams than of the average quality of play. Indeed, overall attendance in the professional sports leagues has increased after each expansion, despite the dilution of talent that occurs at such times.<sup>167</sup>

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<sup>162</sup> See *Associated Press v. United States*, 326 U.S. 1, 12–14 (1944).

<sup>163</sup> *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1380–82 (5th Cir. 1980).

<sup>164</sup> 359 F. Supp. 1260 (N.D. Ga. 1973).

<sup>165</sup> See *id.* at 1265.

<sup>166</sup> Ross, *supra* note 4, at 664.

<sup>167</sup> See *id.* at 664–65; *Super Bowl*, *supra* note 155, at 427.

Another argument against league expansion is its supposed reduction in the percentage of teams with a chance to win a championship. However, the presence of a larger number of teams does not mean that the excitement of championship races will be diminished. Leagues can be divided into additional conferences, giving more teams a chance to compete for a conference championship.<sup>168</sup>

The managerial competence of individual teams may affect a league's competitive balance. If leagues were forced to admit owners who were not capable of putting an effective team on the field, games would be less interesting to fans and the image of the entire league would suffer. Managerial competence, however, does not have to be ensured by membership rules as restrictive as those currently in effect in the major professional sports leagues. Instead of requiring a super-majority vote for expansion, the leagues could simply require that prospective owners meet certain objective standards designed to ensure their ability to manage a team effectively. It would, for example, be reasonable for the leagues to require that applicants have a minimum net worth and proven experience in managing a similar business.<sup>169</sup>

A more open membership policy would, in fact, enhance managerial competence in professional sports leagues. With open access, a truly free market in the purchase and sale of franchises would prevail, and the market would force team owners to operate more efficiently. Since qualified cities could obtain expansion teams, ineffective owners would find it more difficult to escape their problems by moving to another city. Owners would have a greater incentive to satisfy the fans in their home cities by controlling their costs and putting a quality team on the field.

Finally, competitive balance may be harmed if a league is required to expand to a city which is incapable of supporting a professional sports franchise. A franchise cannot field a competitive team on a consistent basis if the community in which it is located lacks sufficient fans with the income to afford ticket prices comparable to those charged by other teams. The leagues may assert that super-majority requirements are necessary to avoid the granting of franchises to unqualified cities. By requiring a three-fourths vote, the leagues can ensure that there is a near-consensus among all owners that expansion to a particular city is appropriate. However, the leagues can adopt less restrictive alternatives that would be just as effective. The leagues could, for example, specify the size and demographic characteristics which cities must demonstrate before they can be granted expansion franchises.<sup>170</sup>

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<sup>168</sup> *Super Bowl*, *supra* note 155, at 427.

<sup>169</sup> See *infra* notes 180–81 and accompanying text.

<sup>170</sup> See *infra* notes 182–83 and accompanying text.

## 2. *The Capacity Argument*

Sports leagues may argue that membership restrictions are required to prevent the leagues from becoming unwieldy. The effective scheduling of games becomes more difficult as leagues expand. Natural rivalries among teams in close geographical proximity may suffer because the teams would have less opportunity to play each other. Finally, fans' enjoyment may decline if a league includes more teams than they can easily follow.

The current membership rules of the leagues, however, bear no relationship to the need to keep the leagues at a manageable capacity. If the leagues want to avoid exceeding their reasonable capacity, they do not need to require a three-fourths vote for expansion. Their bylaws can simply specify that the total number of teams in the league will not exceed a certain number.<sup>171</sup>

## 3. *The Free-Rider Argument*

A joint venture's membership rules can be designed to protect its partners against "free-riding," that is, the ability of latecomers to obtain the benefits of the initial partners' investment at little or no cost. The initial investors in a joint venture assume considerable risk. By restricting access to the venture, they can insure that third parties cannot free-ride on their initial investment.<sup>172</sup> The courts may discourage innovation when they void such membership rules. Firms may be less willing to risk an investment in a start-up joint venture if they believe that other firms can easily join the venture after it becomes successful.<sup>173</sup>

These free-rider arguments do not justify the current restrictive membership rules of the professional sports leagues. Each of the leagues has been successful for decades, and many new teams have been admitted that did not assume the initial risk of the leagues' establishment. If the leagues did not have any free-rider problems with past expansion teams, they should not have such problems

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<sup>171</sup> See *infra* note 191 and accompanying text.

<sup>172</sup> See Donald I. Baker, *Compulsory Access to Network Joint Ventures Under the Sherman Act: Rules or Roulette?*, 1993 UTAH L. REV. 999, 1071-73, 1077.

<sup>173</sup> See Hovenkamp, *supra* note 5, at 70 ("[F]orcing entry by latecomers would encourage everyone to refrain from investing in the venture during its early, high risk period because everyone would have a right to join later when the risks have been overcome, and thus avoid investment in a venture that might fail."); Panel Discussion, *Exclusionary Conduct*, 57 ANTITRUST L.J. 723, 742 (1988) (remarks by William F. Baxter) ("Someone invested in that essential facility. Someone got out front when it wasn't at all clear that the facility was going to work, and now someone else wants to come along and help themselves. The doctrine is a very dangerous one.").

with teams that are added in the future.<sup>174</sup>

The free-rider argument against the expansion of sports leagues is also specious because the incumbent owners have generally *increased* the return on their investment as a result of the addition of new teams. Fan attendance in the leagues has grown following each major expansion.<sup>175</sup> Furthermore, the owners have received increasingly large admission fees from new teams. In 1995, for example, Charlotte and Jacksonville each paid a \$140 million expansion fee to the NFL. This fee was 875% higher than the fee paid by the Tampa Bay Buccaneers and Seattle Seahawks twenty years ago.<sup>176</sup> Major League Baseball recently charged \$150 million fees to the expansion teams in Arizona and Tampa Bay. Those fees were 2400% higher than the amount paid by the Seattle Mariners nineteen years ago.<sup>177</sup> Fees of such magnitude should adequately compensate the current owners for any loss of revenue (such as a smaller portion of national television earnings) which may result from the admission of a new team.<sup>178</sup>

## VI. ACCEPTABLE MEMBERSHIP RULES FOR SPORTS LEAGUES

It would not take many test cases for the courts to establish the parameters of acceptable membership rules for the professional sports leagues. Under the approach described in this Article, the courts would void the current membership rules of each of the leagues because they are broader than necessary to promote the leagues' legitimate objectives.<sup>179</sup> However, the sports leagues would not be required to eliminate all membership restrictions. The leagues would be allowed to establish certain rules for the admission of new teams, including minimum eligibility standards, capacity limits, and requirements for the payment of reasonable franchise fees.

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<sup>174</sup> "For open membership ventures, the free rider argument that the new applicant did not incur any risk at formation time is irrelevant. *None* of the subsequently admitted members had to incur these risks, but most are admitted nonetheless." Hovenkamp, *supra* note 5, at 102.

<sup>175</sup> See *supra* note 167 and accompanying text.

<sup>176</sup> See Patrick, *supra* note 82.

<sup>177</sup> See *id.*; see also Chass, *supra* note 88.

<sup>178</sup> See *Chicago Prof'l Sports Ltd. Partnership v. National Basketball Ass'n*, 961 F.2d 667, 675 (7th Cir. 1992) ("When payment is possible, free-riding is not a problem because the 'ride' is not free."). But see Ross, *supra* note 4, at 657 (arguing that "[t]he smaller share of television revenues offsets the benefit of the one-time entry fee in just a few years").

<sup>179</sup> See *supra* notes 161-65 and accompanying text.

### A. Eligibility Standards

Leagues must be able to enforce certain eligibility standards in order to maintain competitive balance among teams. One commentator has pointed out that a sandlot baseball team could cover the costs of playing the New York Yankees, but if such a team entered Major League Baseball, "the legitimacy of athletic competition and thus the very existence of the professional sport would be threatened."<sup>180</sup> Several courts have held that sports organizations can exclude players who fail to meet reasonable eligibility requirements.<sup>181</sup> Thus, the courts should uphold requirements that applicants for professional sports franchises have the financial ability and related business experience to insure that they can field a team that will be competitive with the other teams in the league.

The leagues also should be able to enforce rules as to the size and demographic characteristics of metropolitan areas which will be granted expansion teams. Obviously, certain cities do not have sufficient fans with the interest and wherewithal to support a profitable franchise in one of the major professional sports. Recent studies have identified the qualities that are likely to predict an area's ability to support a sports team, including population, demographics, average income, and the number of local companies able to purchase luxury seats.<sup>182</sup> The leagues should be permitted to refuse to grant an expansion team to metropolitan areas which do not possess such qualities. The leagues should also be able to deny franchises to cities which already have a franchise in the same league, if the city is not large enough to support more than one team.<sup>183</sup>

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<sup>180</sup> HENRY DEMMERT, *THE ECONOMICS OF PROFESSIONAL TEAM SPORTS* 91 (1973); see also Hovenkamp, *supra* note 5, at 108 ("[S]urely an antitrust court should not go as far as to hold that any qualified group of eleven strong athletes plus a coach should be permitted to join the NFL.").

<sup>181</sup> See *Dessen v. Professional Golfers' Ass'n of Am.*, 358 F.2d 165, 170-72 (9th Cir. 1966) (reasonable for PGA to require golfers to meet certain eligibility rules in order to prevent tournaments from becoming bogged down with inferior players); *Cokin v. American Contract Bridge League, Inc.*, 1983-1 Trade Cas. (CCH) ¶ 65,367 (S.D. Fla. 1981) (expulsion of members for violation of league rules was not per se unlawful group boycott); *Manok v. Southeast Dist. Bowling Ass'n*, 306 F. Supp. 1215, 1219-21 (C.D. Cal. 1969) (suspension of bowler for participating in tournament under assumed name was lawful); *Molinas v. National Basketball Ass'n*, 190 F. Supp. 241, 243 (S.D.N.Y. 1961) ("A rule . . . providing for the suspension of those who place wagers on games in which they are participating seems not only reasonable, but necessary for the survival of the league.").

<sup>182</sup> See *infra* notes 191-93 and accompanying text.

<sup>183</sup> Only the largest metropolitan areas in America (including New York, Chicago, Los Angeles, and the San Francisco Bay Area) are likely to be able to support more than one

Studies have shown that several "have-not" cities in the United States are now qualified to host a professional sports franchise.<sup>184</sup> The eligibility standards adopted by the leagues should be broad enough to permit the granting of franchises to such cities. One study concluded that at least eleven more cities could support major league baseball teams.<sup>185</sup> Another study estimated that Major League Baseball could double the number of its franchises from the current thirty to a total of sixty teams.<sup>186</sup> A recent economic model suggests that there are a number of viable locations without NHL franchises.<sup>187</sup> The NFL's recent expansion to Jacksonville indicates that it believes that the fifty-fifth largest metropolitan area in the United States can support an NFL team.<sup>188</sup> There are twenty-seven metropolitan areas with larger populations that do not have NFL teams,<sup>189</sup> and the NFL would find it difficult to argue that they could not also maintain a professional football franchise.<sup>190</sup>

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franchise in the same sport. However, since there is little, if any, cross-elasticity of demand between the different professional sports, see *supra* notes 67-77 and accompanying text, a league should not be able to deny an expansion team to an otherwise qualified city simply because it already has a franchise in another professional sport.

<sup>184</sup> See Ty Ahmad-Taylor, *Who Is Major Enough for the Major Leagues?*, N.Y. TIMES, Apr. 2, 1995, at E5.

<sup>185</sup> See *id.*

<sup>186</sup> See BILL JAMES, *THE BILL JAMES BASEBALL ABSTRACT* 1988 at 21 (1988).

<sup>187</sup> See Jones and Ferguson, *Location and Survival in the National Hockey League*, 36 J. INDUS. ECON. 443, 455 (1988). The NBA and the NHL have recently added more expansion teams than either the NFL or Major League Baseball. See *supra* note 88. However, this does not mean that the NBA and NHL are closer to full capacity. The NFL, for example, has a forty-five man roster. An NBA team, however, must carry only twelve men, and an NHL team twenty-four men. Thus, the NBA and NHL can more easily expand without exceeding the available pool of talented players. Furthermore, NBA and NHL teams have lower costs than teams in Major League Baseball or the NFL. They therefore should be able to expand to smaller metropolitan areas. The average 1994 payroll for a Major League Baseball team was \$35 million, and the NFL's 1994 salary cap was \$34.6 million. See *Sizing Up Salary Caps*, USA TODAY, Dec. 23, 1994, at C3. By contrast, the NBA's 1994 salary cap was only \$16 million, see *id.*, and the payroll of each NHL team averaged only \$13 million in 1994, see Hochberg, *supra* note 34, at A1. Basketball and hockey teams also often share the same arena, while the trend for baseball and football is away from dual-sport stadiums and toward single-sport venues. See Ozanian, *supra* note 122.

<sup>188</sup> See Sandomir, *supra* note 105.

<sup>189</sup> THE WORLD ALMANAC AND BOOK OF FACTS 1996 389-91 (Robert Famighetti et al eds.).

<sup>190</sup> As Leigh Steinberg, the player agent, has stated, "Plenty more smaller markets can get in. If Jacksonville, the number fifty-five market, can have a team, so can Columbus, which ranks thirty-fourth." Sandomir, *supra* note 105.



## B. Capacity Limits

In order to ensure its efficiency, a league should be allowed to maintain reasonable limits on the total number of teams that can participate in the league.<sup>191</sup> At some point, each professional sports league will reach a capacity beyond which it cannot effectively expand. If there were too many franchises in a league, effective scheduling of games would become impossible, and fans would find it difficult to follow all of the teams. Also, without any aggregate limit, the number of teams eventually would exceed the pool of players with sufficient talent to play the relevant professional sport.<sup>192</sup>

None of the professional sports leagues, however, is yet at full capacity, and the leagues should not be able to use the capacity argument as a rationale for refusing to grant franchises to qualified applicants from cities that can support a franchise. Major League Baseball currently has thirty teams, the NFL has thirty, the NBA has twenty-nine, and the NHL has twenty-six. None of these figures indicates that the leagues are close to a capacity level which would be likely to cause problems with scheduling, fan interest or obtaining a reasonable pool of talented players. The leagues can avoid problems with schedules and fan interest by realigning into additional conferences. They can be assured that player talent will be distributed evenly over a larger number of teams through the player drafts and as a result of competition among teams to attract free agents.

## C. Franchise Fees

Professional sports leagues should be permitted to establish reasonable entrance fees for new teams. Such fees avoid the free-riding problems that would otherwise result from the admission of new franchises.<sup>193</sup> As the Fifth Circuit pointed out in *Realty Multi-List*, however, the amount charged for an

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<sup>191</sup> See *Deesen v. Professional Golfers' Assoc. of Am.*, 358 F.2d 165, 170 (9th Cir. 1966) (exclusion from PGA sponsored golf tours found reasonable in light of necessity for some limitation in size of playing field).

<sup>192</sup> The availability of talented players may also require limits on the frequency of expansion. Expansion teams are stocked with players chosen from existing teams as well as from the player draft. The existing teams cannot be expected to transfer an unlimited number of their players to expansion teams. See *Super Bowl*, *supra* note 155, at 426-27; see also J. WEISTART & C. LOWELL, *THE LAW OF SPORTS* 737 (Supp. 1985) (arguing that unreasonable expansion will exceed the ability or willingness of current owners to subsidize new teams with their players). Thus leagues may legitimately prescribe minimum periods of time that must elapse between the granting of expansion franchises.

<sup>193</sup> See *supra* notes 172-78 and accompanying text.

admission fee should not be left to joint venture members' arbitrary discretion. Rather, admission fees must be determined by objective standards, such as the costs incurred by the current members as a result of the entry of a new member.<sup>194</sup>

It should therefore be permissible for a sports league to require a new team to compensate current owners for the reduced share of national television revenues resulting from the team's admission to the league.<sup>195</sup> A league should not, however, be given *carte blanche* to set entry fees at any level it wishes. Excessively high fees would constitute just as great a hurdle to expansion as the leagues' current super-majority requirements. Since the appropriate amount to charge a new team can only be determined at the time of its admission, the leagues' bylaws could not establish specific admission fees. They should simply set forth the principle that such fees must be related to the costs incurred by the league and its existing teams in connection with the admission of a new member.

## VII. THE COURTS' ABILITY TO REGULATE THE EXPANSION OF SPORTS LEAGUES

Several commentators have argued that the federal courts are not capable of controlling access to essential facilities, because they cannot effectively perform the ongoing regulatory function required by an open access order.<sup>196</sup> In order to make an open access decree both fair and effective, the courts would have to decide, first, which firms should be deemed qualified for admission and, subsequently, the specific terms on which entry should be granted.

Commentators have pointed out that open access decrees would be particularly complex in the case of professional sports leagues. According to these commentators, no objective standard exists by which a court could determine the cities in which expansion is feasible.<sup>197</sup> It would be difficult, if not impossible, for a court to objectively determine whether a team could

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<sup>194</sup> See *United States v. Realty Multi-List*, 629 F.2d 1351, 1385-86 (5th Cir. 1980). The court thus invalidated a bylaw of a real estate multiple listing service which gave the service's board of directors the discretion to determine the amount of the relevant entry fee. See *id.* at 1385.

<sup>195</sup> One commentator has argued that such costs should also include reduced attendance resulting from the initial mediocre play of expansion teams. See Noll, *Alternatives in Sports Policy*, in *GOVERNMENT AND THE SPORTS BUSINESS* 415 (1974).

<sup>196</sup> See Baker, *supra* note 172, at 1076; Steve Lohr, *Ground Rules for the Great Global Connection*, N.Y. TIMES, May 7, 1995, at E1, E16.

<sup>197</sup> See, e.g., Ross, *supra* note 4, at 709-10.

generate a reasonable profit in a particular location.<sup>198</sup> Furthermore, a court would have to consider, not only whether an individual plaintiff met the criteria to obtain an expansion team, but also whether the city it represented was, on a national scale, one of the most acceptable expansion sites. Individual courts would not be well equipped to "allocate new franchises on the basis of a rational comparison among applicants."<sup>199</sup> A court might be inclined to favor local applicants, thus creating a "race to the courthouse" among potential franchise owners.<sup>200</sup>

Contrary to the views of these commentators, the federal courts are well qualified to regulate access to the professional sports leagues. Judicial regulation has long been considered an appropriate response to monopoly power. In the antitrust area, the federal courts are often called upon to implement ongoing remedial decrees which require continuing oversight, and the decrees required for open access to essential facilities are no more complex than those necessary in other antitrust cases.<sup>201</sup> Indeed, in cases such as *St. Louis Terminal, Associated Press, Silver, and Realty Multi-List*, the federal courts were able to fashion appropriate access decrees for essential facilities in other industries. They should also be able to do so for sports leagues. The federal courts are perfectly capable of making the factual judgments required to determine whether a particular plaintiff's admission to a sports league is justified. Furthermore, the complexity of the approach is justified by the serious economic harms which it is designed to remedy. The professional sports leagues are obtaining billions of dollars in monopoly profits from American fans and taxpayers, and the courts' regulation of the leagues' expansion policies would significantly diminish those undue subsidies.

The federal courts can adopt objective criteria to determine when expansion of a league is appropriate. A particular plaintiff's ability to effectively manage a professional sports franchise will be indicated by his or her financial wherewithal and experience in managing other businesses. A metropolitan area's capacity to support a team will be evident from factors such as its population and income levels. Indeed, several empirical studies have already indicated the weight that should be afforded such factors in the courts'

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<sup>198</sup> See *id.*

<sup>199</sup> *Super Bowl*, *supra* note 155, at 427-28.

<sup>200</sup> See Ross, *supra* note 4, at 710.

<sup>201</sup> See Hovenkamp, *supra* note 5, at 118. Indeed, open access decrees are more easily implemented than certain other antitrust remedies, such as divestitures. Professor Ross, for example, has proposed that the monopoly power of professional sports leagues be remedied by breaking the current leagues up into separate leagues. See Ross, *supra* note 4, at 646, 748-54. However, the approach proposed in this article would accomplish the same purposes in a less intrusive manner. Instead of having to disband, the leagues would simply have to adopt more reasonable membership rules.

analysis.<sup>202</sup> By using such standards, the federal courts can avoid local favoritism in their decisions on league expansion and ensure that new franchises are awarded pursuant to a rational national perspective.<sup>203</sup>

The courts' remedial task would become much easier after the initial cases concerning entry to each of the professional sports leagues. As part of the remedy in such cases, a court would void the current membership rules of the leagues and require them to implement more reasonable rules. The leagues could, for example, be ordered to set forth eligibility standards for applicants, criteria for cities eligible to host franchises, and the maximum number of teams that could be admitted to the leagues. A court could retain jurisdiction over a case until the league had implemented appropriate membership rules. Such an approach would reduce future litigation and limit the scope of cases to the issue of whether the leagues had properly applied their new membership policies.

Once a court has determined that a particular team should be admitted to a league, it must ensure that the league does not unfairly discriminate against the new entrant. There are many ways in which a league could frustrate a court's entry order. The league could, for example, impose an excessive entry fee, decline to adequately share revenue from a national television contract or from the licensing of league products, or refuse to allow the new entrant to stock its team with high draft picks or players from existing teams.

The courts can preclude such actions through rather simple decrees similar to those adopted in other essential facilities cases. The decrees would leave the maximum possible discretion to the leagues to determine the specific terms for the admission of new members. The decrees merely need to require the leagues to admit new members on nondiscriminatory terms. In *St. Louis Terminal*, for example, the Supreme Court's decree gave the association members the discretion to admit members "upon such just and reasonable terms as shall place such applying company upon a plane of equality in respect of benefits and

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<sup>202</sup> One economic model commissioned by Major League Baseball found that a Standard Metropolitan Statistical Area with a population of at least 1.25 million could support a professional sports franchise. See Ross, *supra* note 4, at 663 n.86. Another study predicted an area's ability to support a team on the basis of its potential to attract at least 1.5 million fans to a team with a won-loss percentage of .500. See *id.* at 756-58 (Appendix A). A recent study indicated that, based on population, demographics, income levels, and potential corporate support, at least eleven more metropolitan areas in the United States could support major league baseball teams. See Ahmad-Taylor, *supra* note 184.

<sup>203</sup> Because of the need for national standards in the awarding of franchises, the federal courts' decisions on league expansion should be deemed to pre-empt any similar decisions by state courts. See *State v. Milwaukee Braves, Inc.*, 144 N.W.2d 1 (Wis. 1966) (finding that federal antitrust exemption for baseball pre-empted decision under Wisconsin antitrust law requiring Major League Baseball to grant expansion franchise to Milwaukee).

burdens with the present proprietary companies.”<sup>204</sup> In *Realty Multi-List*, the Fifth Circuit fashioned a similar decree requiring the multiple listing service to reform its bylaws to permit applicants to become members upon “just and reasonable terms.”<sup>205</sup> A similarly broad order is appropriate for sports leagues. In most cases, it should be sufficient for the courts to require that the leagues admit a new member on terms that will place it on an equal basis with the current teams with respect to admission fees, revenue sharing, and the availability of players.

It will be relatively easy for the courts to guarantee equal treatment for revenue sharing and the drafting of players. They can simply require the leagues to treat teams whose entry is compelled in the same way as they have treated other teams which have been granted expansion franchises. It will be more difficult to determine the amount which leagues may charge for an admission fee. The last admission fee paid by an expansion franchise may not be an adequate standard because of changed circumstances. A league should be allowed to charge a new team for the costs incurred by the existing teams as a result of its entry to the league, including each team’s reduced share of national television revenues.<sup>206</sup> Since the leagues themselves can best determine the amount of such costs, a court would be well advised to leave them with the maximum possible discretion. After ordering expansion, a court could retain jurisdiction over a case and, if the parties were unable to agree on an admission fee, they could litigate the issue of the amount of costs that should be amortized by the fee.<sup>207</sup>

### VIII. POTENTIAL LEGAL OBSTACLES TO SPORTS LEAGUES’ COMPELLED EXPANSION

#### A. *Baseball’s Antitrust Exemption*

The courts cannot compel Major League Baseball to adopt a less restrictive membership policy unless either the Supreme Court or Congress overrules baseball’s antitrust exemption. The Supreme Court exempted baseball from the antitrust laws in the 1922 case, *Federal Baseball Club of Baltimore v. National*

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<sup>204</sup> *United States v. Terminal R.R. Ass’n*, 224 U.S. 383, 441 (1912).

<sup>205</sup> *United States v. Realty Multi-List*, 629 F.2d 1351, 1387 (5th Cir. 1980).

<sup>206</sup> See *supra* notes 193–95 and accompanying text.

<sup>207</sup> In *International Boxing Club of New York v. United States*, 358 U.S. 242 (1959), the Supreme Court affirmed a decree requiring the compulsory leasing of Madison Square Garden for boxing events. The defendant was ordered to lease the stadium to any qualified promoter at a reasonable rental rate. The decree provided that if the parties could not agree on such a rate, they could apply to the court for a determination thereof. See *id.* at 261 n.10.

*League*.<sup>208</sup> Justice Holmes concluded in that case that the business of baseball principally involved intrastate activities to which the federal antitrust laws did not apply.<sup>209</sup> Although this decision has been called "a curious vestige of early twentieth century Commerce Clause jurisprudence,"<sup>210</sup> the Supreme Court has reaffirmed baseball's antitrust exemption on two other occasions, most recently in 1972.<sup>211</sup> It is therefore unlikely that the Court would overrule the exemption.<sup>212</sup> The prospects of a legislative overruling of the exemption are also uncertain. During and immediately following the major league baseball strike of 1994-1995, several bills were introduced in Congress to end baseball's antitrust exemption, but none of the proposals reached the floor of either the House or the Senate.<sup>213</sup>

Congress should act as soon as possible to overrule baseball's antitrust exemption and permit the courts to review the expansion policies of Major League Baseball. The Major Leagues have added only six teams in the last twenty-five years.<sup>214</sup> The scarcity of franchises has allowed the baseball owners to obtain significant subsidies from fans and taxpayers. The expansion fees received by the leagues have escalated from \$2.45 million per team in 1960 to \$150 million per team in 1995.<sup>215</sup> Although no baseball team has relocated since the Washington Senators changed their name and moved to Texas in 1972,<sup>216</sup> many teams have used the threat of relocation to induce cities to

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<sup>208</sup> 259 U.S. 200 (1922).

<sup>209</sup> See *id.* at 208-09.

<sup>210</sup> Bauer, *supra* note 21, at 267.

<sup>211</sup> See *Flood v. Kuhn*, 407 U.S. 258, 282-85 (1972); *Toolson v. New York Yankees*, 346 U.S. 356, 356-57 (1953) (*per curiam*).

<sup>212</sup> Although the Court in the *Flood* case described baseball's antitrust exemption as an "aberration," it concluded that it was a problem "of long standing that is to be remedied by the Congress and not by this Court." *Flood*, 407 U.S. at 282, 284. One court, however, has interpreted baseball's antitrust exemption narrowly, holding that *Flood* limited the exemption to baseball's "reserve system" for players and that the exemption should not apply to allegations that Major League Baseball restrained competition in the sale of team franchises. See *Piazza v. Major League Baseball*, 831 F. Supp. 420, 421, 435-41 (E.D. Pa. 1993).

<sup>213</sup> See Keith Bradsher, *Congressmen Pledge to Revoke Baseball's Antitrust Exemption*, N.Y. TIMES, Dec. 24, 1994, at 1; Murray Chass, *It's Time to Play Hardball on Capitol Hill*, N.Y. TIMES, Jan. 4, 1995, at B7; Mark Maske, *Senate Takes on Baseball*, WASH. POST, Aug. 4, 1995, at F1.

<sup>214</sup> See Patrick, *supra* note 82; Chass, *supra* note 88.

<sup>215</sup> See *supra* note 90 and accompanying text.

<sup>216</sup> See John Romano et al., *Focus Shifts to Luring an Existing Franchise*, ST. PETERSBURG TIMES, June 11, 1991, at A1. Because of its antitrust exemption, Major League Baseball has been able to control franchise relocations. See Chass, *supra* note 88. The NFL, on the other hand, was found to have violated section 1 when it attempted to prevent the Raiders' move from Oakland to Los Angeles, see *Los Angeles Mem'l Coliseum Comm'n v.*

subsidize new stadiums.<sup>217</sup> Have-not cities have been willing to go to extraordinary lengths to obtain major league franchises.<sup>218</sup> If Congress would overrule baseball's antitrust exemption, the federal courts could force the Major Leagues to grant franchises to qualified owners in cities that could support teams, thus reducing the owners' ability to obtain undue subsidies.

## B. Statutes

Congress has passed two statutes granting narrow antitrust exemptions to the professional sports leagues. Neither statute would prevent the courts from adopting the approach proposed in this Article. A 1966 law permitted the NFL to merge with its only rival at that time, the American Football League.<sup>219</sup> Although the statute allowed the NFL to acquire its monopoly power, it did not extend an antitrust exemption to its abuse of that power.<sup>220</sup> Nothing in the law authorizes the NFL teams to agree among themselves to restrict the output of franchises through unreasonably exclusionary membership rules.

The other statutory antitrust exemption allows the members of Major League Baseball, the NFL, the NBA, and the NHL to sell package rights to the networks to broadcast league games.<sup>221</sup> The law is narrowly drawn and does not apply to alleged violations of the Sherman Act resulting from conduct other than the sale of broadcast rights.

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National Football League, 726 F.2d 1381, 1381 (9th Cir. 1984), and as a consequence, NFL teams have been willing to defy the NFL's relocation rules, *see supra* notes 42-44 and accompanying text.

<sup>217</sup> For example, Cuyahoga County built a new stadium for the Cleveland Indians after Fay Vincent, the Commissioner of Baseball, stated that the franchise might move if it had to continue to play in Cleveland Stadium. *See* Leigh Montville, *Anxiety in Cleveland*, SPORTS ILLUSTRATED, May 21, 1990, at 124. For other examples of such threats, *see supra* note 118 and accompanying text.

<sup>218</sup> The St. Petersburg-Tampa Bay area, for example, was so desperate to obtain a Major League Baseball team that it built a \$110 million domed stadium which sat empty for five years before it was granted an expansion franchise. *See* Romano, *supra* note 216; Rod Beaton & Mel Antonen, *Expansion Teams Pumping Up Fans, Economies*, USA TODAY, Mar. 10, 1995, at C10.

<sup>219</sup> *See* Act of Nov. 8, 1966, Pub. L. No. 89-800 § 6(b)(1), 80 Stat. 1515 (1966), *codified as amended* at 15 U.S.C. § 1291 (1982).

<sup>220</sup> *See* Mid-South Grizzlies v. National Football League, 720 F.2d 772, 784 (3d Cir. 1983).

<sup>221</sup> *See* Sports Broadcasting Act, 15 U.S.C. §§ 1291-1295 (1982).

### C. Common Law Precedent

There is limited common law precedent against the compelled expansion of sports leagues. In two cases, the Third and Ninth Circuits refused to order the admission of plaintiffs to the NFL and NHL. Each of those cases, however, was based on the erroneous assumption that professional sports teams do not compete with each other on an economic basis. That assumption runs contrary to the realities of the modern sports marketplace, where owners are competing more intensely than ever to enhance their revenues and the market value of their teams.<sup>222</sup> Those decisions are also at odds with the federal courts' prevailing view that sports teams are, in fact, economic rivals whose collective action can injure competition in the relevant market.

In *Mid-South Grizzlies v. NFL*,<sup>223</sup> the plaintiffs owned the Grizzlies, a Memphis football team which had originally played in the World Football League. The Grizzlies applied for admission to the NFL and were rejected. The owners of the team sued the NFL, claiming that the league's refusal to grant them a franchise in Memphis constituted a per se illegal group boycott. The district court granted summary judgment for the NFL, and the Third Circuit affirmed. The Circuit Court assumed that economic competition could only occur between professional football teams in the same geographic area. According to the Third Circuit, the nearest NFL team, which at that time was 280 miles away in St. Louis, was not close enough to compete with the Grizzlies.<sup>224</sup> Thus, the court believed that competition was not harmed by the plaintiffs' inability to obtain a franchise. The court concluded that entry to the NFL could not be compelled under the essential facilities doctrine because "[t]he Grizzlies have simply failed to show how competition in any arguably relevant market would be improved if they were given a share of the NFL's monopoly power."<sup>225</sup>

In *Seattle Totems Hockey Club v. NHL*,<sup>226</sup> a Seattle hockey team which had been a member of the World Hockey Association alleged that the NHL had violated section 1 by refusing to admit it to the league. As the Third Circuit had

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<sup>222</sup> See *supra* notes 32-46 and accompanying text.

<sup>223</sup> 550 F. Supp. 558 (E.D. Pa. 1982), *aff'd*, 720 F.2d 772 (3d Cir. 1983).

<sup>224</sup> See *Mid-South Grizzlies*, 720 F.2d at 787.

<sup>225</sup> *Id.* A recent case relied on *Grizzlies* in dismissing a complaint alleging that the NFL unlawfully refused to grant an expansion franchise. In *Murray v. National Football League*, 1996 U.S. Dist. LEXIS 9108, at \*36-37 (E.D. Pa. June 26, 1996), the court held that the NFL's refusal to grant an expansion franchise to the plaintiffs for the cities of St. Louis or Hartford was "not cognizable as an injury to competition." *Id.* at \*37. Citing *Grizzlies*, the court pointed out that, at the time of the suit, there was no NFL team in either area with which an expansion team would have competed. See *id.*

<sup>226</sup> 783 F.2d 1347 (9th Cir. 1986).



in *Grizzlies*, the Ninth Circuit affirmed the dismissal of the plaintiff's complaint on the grounds that it was not a competitor of the other teams in the NHL. Citing *Grizzlies*, the court pointed out that competition could not have been harmed because there was no other major league hockey team in the Seattle market with which the plaintiff would have competed.<sup>227</sup>

The *Grizzlies* and *Seattle Totems* cases were wrongly decided. They assumed that teams in a sports league can only compete on an economic basis if they are in close geographic proximity. In fact, however, the owners of professional sports franchises are in national competition with each other. All of the owners in a league compete to maximize the value of their teams in the national market for sports franchises. Adding a new team to a league is equivalent to bringing an additional competitor into that market. The *Grizzlies* and *Seattle Totems* courts failed to recognize that expansion of the NFL and NHL likely would have benefited consumers. As a result of the increase in the number of franchises in each league, the prices of all franchises would have fallen and the current owners would have had a greater incentive to manage their teams efficiently.<sup>228</sup>

The *Grizzlies* and *Seattle Totems* cases are in conflict with the predominant trend in the federal courts' approach to professional sports leagues. Recent cases involving player restrictions, television broadcast rights, and franchise relocation have found that all of the teams in a sports league are economic competitors and that intraleague competition is worthy of protection under the antitrust laws. If the *Grizzlies* and *Seattle Totems* courts had also recognized that the members of sports leagues are economic rivals, they would have been compelled to conclude that the NFL and NHL owners could not legally refuse

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<sup>227</sup> See *id.* at 1350. Although not directly on point, other cases have found that the teams in a sports league do not compete on an economic basis. In *Levin v. National Basketball Association*, 385 F. Supp. 149 (S.D.N.Y. 1974), the plaintiffs alleged that the NBA violated section 1 by refusing to approve their application to purchase the Boston Celtics. Although the court rightly pointed out that the rejection of the application did not adversely affect competition (because such rejection did not affect the number of clubs in the NBA), the court stated in dicta that section 1 did not apply because the plaintiffs "wanted to become partners with, not competitors of, those who excluded them." *Id.* at 152 n.6. In *San Francisco Seals Ltd. v. National Hockey League*, 379 F. Supp. 966 (C.D. Cal. 1974), the court held that the refusal of the NHL to permit a San Francisco franchise to move to Vancouver did not violate section 1. The court based its conclusion on the fact that the NHL teams were not competitors in an economic sense. See *id.* at 969.

<sup>228</sup> But see Hovenkamp, *supra* note 5, at 110 ("[S]upposing Iowa City's collection of paid football players, the Buccaneers, wished to join the NFL, the essential facility doctrine would not come to their rescue. There would be no more competition in the NFL after the Buccaneers were admitted than before.").

to consider a potential entrant to their league.<sup>229</sup>

The federal courts have consistently held that the teams in a league cannot agree among themselves to limit competition for player services. The courts have voided agreements among teams to allocate initial rights to bargain with players through the player drafts<sup>230</sup> as well as subsequent limitations on the rights of players to move from one team to another.<sup>231</sup> They have also precluded the members of sports leagues from conspiring to limit the number of games that can be broadcast on television.<sup>232</sup> Each of these cases was based on the assumption that all of the teams in a particular league are economic competitors.

In *Seattle Totems*, the Ninth Circuit failed to appreciate the implications of its own decision in *Raiders*, which was rendered just two years earlier. The Ninth Circuit in *Raiders* had expressly rejected the NFL's single entity defense and found that each of the NFL teams compete with each other.<sup>233</sup> The court

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<sup>229</sup> See Roberts, *supra* note 10, at 282 n.213 ("If one regards each league member as a competitor in the nationwide market in which player services are purchased and sold, a league's failure to add a new member could be considered a group of competitors' exclusionary horizontal boycott designed to prevent another competitor from entering the market. Such horizontal group boycotts are often found to be illegal per se.").

<sup>230</sup> See *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1979) (finding NFL draft illegal); *Boris v. United States Football League*, 1984-1 Trade Cas. (CCH) ¶ 66,012 (C.D. Cal. 1984) (discussing illegality of rule prohibiting teams from selecting player unless his college eligibility had expired or until at least five years after he entered college); *Linseman v. World Hockey Ass'n*, 439 F. Supp. 1315 (D. Conn. 1977) (holding illegal rule prohibiting person under age 20 from playing in professional hockey league); *Robertson v. National Basketball Ass'n*, 389 F. Supp. 867, 890-96 (S.D.N.Y. 1975) (holding NBA draft illegal).

<sup>231</sup> See *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976) (holding illegal requirement that team acquiring free agent compensate player's former team); *Bowman v. National Football League*, 402 F. Supp. 754 (D. Minn. 1975) (holding illegal agreement by NFL teams not to sign players who had played for the rival World Football League). These cases would not preclude the professional sports leagues from continuing to use a players' draft or restricting the free movement of players if such conditions are included in a collective bargaining agreement. Under the labor exemption, restraints agreed to in arms-length bargaining cannot give rise to liability under the antitrust laws. See *McCourt v. California Sports, Inc.*, 600 F.2d 1193, 1197 (6th Cir. 1979); *Mackey*, 543 F.2d at 614.

<sup>232</sup> See, e.g., *Chicago Prof'l Sports Partnership v. National Basketball Ass'n*, 961 F.2d 667 (7th Cir. 1992) (holding illegal NBA's limitation on number of times its teams could appear on television "superstation").

<sup>233</sup> In rejecting the single entity argument, the court stated:

To tolerate such a loophole would permit league members to escape antitrust responsibility for any restraint entered into by them that would benefit their league or enhance their ability to compete even though the benefit would be outweighed by its

characterized the NFL as “an association of teams sufficiently independent and competitive with one another to warrant rule of reason scrutiny under section 1 of the Sherman Act.”<sup>234</sup> The NFL teams, the court pointed out, possessed all the indicia of independent competitors. They were independently owned, separately accounted for profits and losses, and competed with each other to acquire the best players, coaches, and management personnel. The necessity for the teams to cooperate in certain ways through their joint venture did not preclude them from competing with each other:

Although the business interests of league members will often coincide with those of the NFL as an entity in itself, that commonality of interests exists in every cartel. . . . [L]egitimate collective action should not be construed to allow the owners to extract excess profits. In such a situation the owners would be acting as a classic cartel.<sup>235</sup>

There is no basis for the *Grizzlies* and *Seattle Totems* courts’ conclusion that teams in a league compete on a local but not on a national basis. In *Seattle Totems*, the Ninth Circuit attempted to distinguish *Raiders* by pointing out that it had only involved the potential restriction of competition in the Los Angeles area between the Rams and the Raiders.<sup>236</sup> In *Grizzlies*, the Third Circuit stated that the NFL’s rejection of a franchise application for an area which already had an NFL team “might require a different antitrust analysis than is suggested by this record.”<sup>237</sup> Such an approach, however, is anomalous. It would require the NFL to grant an expansion team to a qualified applicant in the New York area, which already has two NFL teams, but not in the Los Angeles area, which currently has no NFL teams.

The *Grizzlies* court also failed to appreciate that current intraleague competition is more worthy of protection than potential future competition between rival sports leagues. The Third Circuit concluded that the NFL’s refusal to grant a franchise for the Memphis area was “patently pro-competitive, since it left the Memphis area . . . as a site for another league’s

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anticompetitive effects. Moreover, the restraint might be one adopted more for the protection of individual league members from competition than to help the league.

Los Angeles Coliseum Comm’n v. National Football League, 726 F.2d 1381, 1388 (9th Cir. 1984) (citing North Am. Soccer League v. National Football League, 670 F.2d 1249, 1257 (2d Cir. 1982)).

<sup>234</sup> *Raiders*, 726 F.2d at 1389.

<sup>235</sup> *Id.* at 1389, 1392.

<sup>236</sup> See *Seattle Totems*, 783 F.2d at 1350.

<sup>237</sup> *Midwest Grizzlies*, 720 F.2d at 787.

franchise.”<sup>238</sup> As one commentator has pointed out, it is “rather dubious” that the plaintiffs could have competed in the professional football market by forming another league.<sup>239</sup> Indeed, it is impossible for a rival league to compete with the NFL today,<sup>240</sup> and thus competition would have been better enhanced by allowing the Grizzlies to enter the NFL. In contrast to a highly unlikely enhancement of competition at some future date, the professional football market would have enjoyed an immediate benefit from the introduction of a new competitor.

The *Grizzlies* court’s preference for the formation of a rival league completely misreads the meaning of the essential facilities cases. Those cases recognized that certain joint ventures are the only viable means of entry to the relevant market. Under such circumstances, competition is best enhanced by permitting all qualified parties to participate in the venture rather than by forcing them to duplicate it. As the Seventh Circuit concluded in the *Fishman* case:

The point of the essential facilities doctrine is that a potential market entrant should not be forced simultaneously to enter a second market, with its own large capital requirements. Such a requirement would allow the owner of an essential facility to monopolize the market as to which his facility is the ‘bottleneck.’<sup>241</sup>

Most fundamentally, the Third Circuit in *Grizzlies* and the Ninth Circuit in *Seattle Totems* failed to recognize controlling Supreme Court precedent. Both of those cases are at odds with the Court’s decision in *NCAA*. In that case, the Court found that the NCAA’s member colleges competed against each other for television revenues, fans, and athletes.<sup>242</sup> The Court pointed out that the NCAA’s restrictions on television broadcasts were particularly suspect, because they constituted an agreement among competitors to limit their output of a product.<sup>243</sup> The members of professional sports leagues compete no less vigorously than the NCAA’s member colleges. Furthermore, the sports leagues’ restrictions on the granting of new franchises are no less restrictive of competition than the NCAA television restrictions. In each case, a sports league has prevented its members from responding to consumer demand for a highly desirable product. The owners of teams in the professional sports leagues, like the colleges participating in the NCAA, should not be allowed to combine with

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<sup>238</sup> *Id.* at 786.

<sup>239</sup> See Roberts, *supra* note 10, at 282.

<sup>240</sup> See *supra* notes 80–83 and accompanying text.

<sup>241</sup> *Fishman v. Estate of Wirtz*, 807 F.2d 520, 540 (7th Cir. 1986).

<sup>242</sup> See *National Collegiate Athletic Ass’n v. Board of Regents*, 468 U.S. 85, 99 (1984).

<sup>243</sup> See *id.* at 107–08.

their competitors to restrict output without a legitimate efficiency justification.<sup>244</sup>

## IX. CONCLUSION

The approach proposed in this Article for the antitrust regulation of the expansion of the professional sports leagues is not radical. Indeed, its underpinnings lie within the mainstream of antitrust thinking during the last eighty-five years. As monopolies which control access to the relevant markets, Major League Baseball, the NFL, the NBA, and the NHL should be required to fairly consider all qualified applicants. The arguments made by courts and commentators for exempting the leagues from antitrust liability are unpersuasive. There is no substantive distinction between the artificial scarcity of franchises created by the leagues and the cartel-like activity of competitors who have attempted to maintain monopoly control in other markets. The leagues have used their monopoly power to exact enormous subsidies from sports fans and taxpayers. The courts have at their disposal the tools necessary to prevent this abuse. Expansion of the professional sports leagues is required by long-established precedent, and it can be accomplished in a way that protects the leagues' legitimate efficiency objectives. The federal courts should not hesitate, at the earliest opportunity, to require the leagues to adopt more open membership policies that will put an end to the monopoly profits which they have earned for so many years at the expense of American consumers.

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<sup>244</sup> In *Brown v. Pro Football, Inc.*, No. 95-388, 1996 U.S. LEXIS 4047 (June 20, 1996), the Supreme Court considered the applicability of the non statutory labor antitrust exemption to multi-employer bargaining by the members of the NFL. The Court emphasized that the law should not treat multi-employer bargaining any differently than single-employer bargaining. *See id.* at \*14-15. The Court also pointed out that the members of the NFL are "more like a single bargaining employer," *id.* at \*31, because "the clubs that make up a professional sports league are not completely independent economic competitors, as they depend upon a degree of cooperation for economic survival," *id.* at \*30 (citing *National Collegiate Athletic Ass'n*, 468 U.S. at 101-02). This conclusion is not inconsistent with the Court's approach in *NCAA* and does not imply that sports leagues should be treated as a single economic entity. Indeed, the Court's language recognizes that sports leagues are characterized by a blend of competition and cooperation. As discussed *supra* notes 18-47, this characteristic makes it appropriate to treat sports leagues like any other joint ventures among competitors.

